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No. 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1938

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*
Petitioners

against

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA affiliated with the COMMITTEE FOR INDUSTRIAL ORGANIZATION
Intervenor-respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

The opinion of the Court below (R. 1737-1747) is reported in 95 Fed. (2nd) 390. The decision, findings, conclusions and order of the National Labor Relations Board (hereinafter usually referred to as "the Board") are reported in 4 N. L. R. B. 10 and are at R. 65-130.

Jurisdiction

The jurisdiction of this Court has been invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1935 (c. 229 § 1; 43 Stat. 938; 28 U. S. C. A. § 347 (a)), and Section 10 (e) and (f) of the National Labor Relations Act (Act of Congress, July 5, 1935; 49 Stat. 10).

The petition below (R. 1473-1553) asked for review of the decision, findings, conclusions and order of the Board, which were adverse to the petitioners. The Board answered (R. 1691-1703) and also cross-petitioned for enforcement of its order (R. 1703-1711). The decree of the Circuit Court of Appeals entered on March 21, 1938, granted enforcement (R. 1748).

As a "person aggrieved" by the Board's order, the International Brotherhood of Electrical Workers and its seven Local Unions among the petitioners' employees (hereinafter usually referred to as "the Brotherhood") also filed a petition for review (R. 1554-1643), under Section 10 (f) of the Act.

Writs of certiorari were granted by this Court to the petitioners and the Brotherhood on May 16, 1938.

Statute Involved

The statute involved is the National Labor Relations Act (hereinafter referred to as "the Act"). The particular provisions are Sections 1, 2 (5), (6) and (7), 6, 7, 8 (1), (2) and (3), and 10 (a), (b), (c), (e) and (f).

Pertinent provisions of the Rules promulgated by the Board pursuant to Section 6 of the Act also are involved. These are shown as an Appendix of this brief.

Questions Presented

(1) Does the National Labor Relations Act authorize the Board to exercise jurisdiction over the petitioners, which are local operating public utilities[1] doing business

[1] The petitioners will, for the purposes of this brief, be characterized inclusively as local operating public utilities. The petitioner Consolidated Telegraph and Electrical Subway Company, however, is not a public utility (R. 1324), does not sell any utility service, but maintains and operates sub-surface ducts under contracts with the City of New York (R. 1325).

wholly within the City of New York and the adjacent county of Westchester, in the State of New York, were not claimed below[1] to be themselves engaged in "commerce" as defined in the Act, and are subject to plenary regulation by the State of New York under its Public Service Law and its State Labor Relations Act?

(2) If the National Act was intended to confer on the Board jurisdiction over the petitioners as to the matters here complained of by the Board, is the Act constitutional as so construed and applied?

(3)[2] Where the Trial Examiner designated by the Board made no report or findings and none of the members of the Board saw or heard any of the witnesses, and the Board gave to the petitioners no opportunity to be heard before the Board (although such an opportunity was requested), nor any opportunity to object to or be heard as to any proposed findings, do the findings of fact made by the Board under such circumstances conform to the requirements of the Board's Rules and to due process of law?

(4) Were the petitioners denied due process of law by the Trial Examiner at the direction of the Board, by their refusal to hear evidence sought to be introduced in behalf of the petitioners?

(5) Where, as the Court below found, the refusal by the Trial Examiner, at the direction of the Board, to hear certain evidence sought to be introduced in behalf of the

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[1] The Court below said (R. 1739): "It is not contended that the petitioners are themselves engaged in commerce as so defined [in the Act]." See, also, the Board's statement, in its cross-petition for enforcement, as to the territorial scope of the petitioners' business (Answer, R. 1703-1704).

[2] Questions (3) to (7), both inclusive, are to be considered in conjunction and cumulatively, as presenting the question whether or not the Board denied to the petitioners a full and fair hearing and impartial determination according to due process, and as to whether or not the doing of these various things in one proceeding show, when taken together, that the Board's hearing and determination as to the petitioners were unfair, arbitrary and lacking in due process.

petitioners, was "unreasonable and arbitrary", are the findings of fact made by the Board, on the basis of a record thus arbitrarily restricted, nevertheless to be taken as conclusive if the petitioners, at the time of the proceedings to review the Board's order, did not ask the Court for an order directing that the evidence be taken and made a part of the transcript?

(6) In the absence of evidence that the alleged unfair labor practices with which petitioners were charged have led or are likely to lead to an actual obstruction or interference with interstate commerce, and in the absence of evidence of the inadequacy of the State system of regulation of petitioners' labor relations in behalf of the predominant local interest, may the Board establish and exercise Federal jurisdiction over local activities such as those of the petitioners, by *assuming* that if the practices were not stopped they *might* cause a strike, the strike *might* suspend the petitioners' service to some extent, and interstate commerce engaged in by others *might* thereby be burdened or obstructed?

(7) Were the petitioners denied due process of law by Section 1(f) of the Board's order, which would require the petitioners to cease and desist from giving effect to their collective bargaining contracts with the International Brotherhood of Electrical Workers, a labor organization affiliated with the American Federation of Labor, when no question as to the validity of these contracts was raised in the complaint or stated at the hearings, which closed without any notice or indication that the validity of the contracts was in question or was to be determined, and when the Board dismissed so much of the complaint as involved any charges that the petitioners had dominated or interfered with the formation or administration of, or had contributed financial or other support to, the Brotherhood, contrary to Section 8(2) of the Act?

SUMMARY STATEMENT OF THE PROCEEDINGS

The charge

The proceedings before and by the Board were initiated by the filing of a "charge" (R. 4-6) by the United Electrical and Radio Workers of America (hereinafter usually referred to as "the United"), a labor organization affiliated with the Committee for Industrial Organization (hereinafter usually referred to as "the CIO"). The complaint of the Board was based wholly on this charge (R. 7-16). In the review proceedings in the Court below, the United was admitted as an intervenor, upon its application (R. 1737).

The "charge" was sworn to by Martin Wersing on May 5, 1937 (R. 6). It alleged "unfair labor practices" within the meaning of Section 8(1), (2) and (3) of the Act, in that the petitioners were said to have discharged five named employees because of their membership in and activity in behalf of a labor organization (R. 4-5); to have interfered with their employees' right of self-organization "by contributing financial and other support" to the Brotherhood (R. 5) and by coercing employees "to disaffiliate from labor organizations of their own choosing and to join the I. B. E. W." (R. 5); and to have employed so-called "industrial spies" (R. 5). Although the charge was sworn to two weeks after the Companies had announced, to their employees and publicly (R. 1204-1205), their recognition of the Brotherhood and the negotiation of collective bargaining contracts with the Brotherhood in behalf of its members (R. 1211-1212; Board's Exhibit No. 14, printed at R. 1394-1405), the "charge" did not mention, much less make any attack on, the contracts.

The Board's complaint and the various amendments of it

The complaint by the Board[1] was served on May 12, 1937. It related only to the discharge of the five employees and to alleged "unfair labor practices" (R. 7-17). It tendered no issue as to the *representation* of employees, which would have arisen under Section 9(c) of the Act; and the presence of such an issue in the case was repeatedly disclaimed by counsel for the Board (R. 279, 525-526), who also said the complaint was not "directed against the I. B. E. W." (R. 279, 285).

As served[1], the complaint by the Board referred to the Brotherhood only in Paragraph 22 (R. 15) and did not allege that anything set out in Paragraph 22 "affected commerce" or had any relation to "commerce" as defined in the Act (Pars. 23 and 24; R. 15-16). This defect in such allegations as related to the Brotherhood was dealt with by an amendment which the Board allowed itself on June 14th (R. 15, 526), without notice to the Brotherhood. Neither as served on May 12th nor as at any time amended up to or at the closing of hearings on July 6th, did the complaint make any allegation against, or even refer to, the collective bargaining contracts between the Companies and the Brotherhood.

The complaint as served was amended several times during the hearings and at the final hearing, sometimes without prior notice to the petitioners as well as over their objections (R. 40-41, 164, 408, 526, 1196). Some of the amendments changed substantially the nature and scope of the proceeding (R. 408, 526, 1196). The last amendment[1] was made without notice and over objections; it was on the last day of the hearings (July 6, 1937), ostensibly to conform the complaint to the proofs adduced in behalf of the Board (R. 1196), thereby broadening the complaint to embrace events,

[1] As shown at R. 7, the text of the complaint as given in the Record is the text of the complaint *as served*. The various amendments allowed from time to time during the hearings (*exclusive* of that allowed on the day testimony was closed) are shown as foot-notes; e. g., R. 13, 14, 15. For this final amendment, see R. 1196; 1312, fol. 3935.

even those ante-dating the Act as well as the complaint, to which witnesses called by the Board had testified over repeated objections by the petitioners, as well as the numerous documents produced as exhibits at the Board's request[1] (e. g. R. 179, 193-194, 199, 320, 357, 358, 426, 430, 431, 436, 1107, 1198).

The Board's complaint as from time to time amended by the Board was at no time served, and no notice of any of the amendments was at any time served upon the Brotherhood (R. 408-409, 1568-1569). The Brotherhood did not appear or take part in the hearings before the Board (R. 1739).

As finally amended, the complaint (R. 7-16 and footnotes and R. 1196) alleged that:

(1) The Companies had discharged and refused to reinstate six named employees, because they joined and assisted a labor organization;

(2) The Companies had contributed and were contributing to the financial support of the Brotherhood and had coerced and were coercing their employees to join the Brotherhood;

(3) The Companies had employed and were employing spies for the purpose of ascertaining the Union activities of their employees;

(4) The foregoing activities by the Companies had "a close, intimate and substantial relation" to commerce as defined in the Act, etc. (R. 15-16); and

(5) By their foregoing activities, the Companies had engaged in and were engaging in unfair labor practices "affecting commerce" as defined, and contrary to Section 8(1), (2) and (3), and Section 2(6) and (7) of the Act.

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[1] See list of exhibits (R. v to xi).

The petition by the Companies for a hearing directly by the Board

Immediately after the complaint of the Board had been served, the petitioners appeared specially and on May 17th petitioned the Board (R. 19-33) for a hearing "directly by the Board" on the question of jurisdiction and on "any further proceedings herein" (R. 21, 32), and asked also that the question of jurisdiction be heard separately and before hearing upon the various charges set forth in the complaint (R. 21, 32). The request of the Companies for an opportunity to be heard by and before the Board itself was thus brought to the attention of the Board itself (R. 21). The same request was renewed orally, on June 3rd, the day the hearings opened (R. 143).

The Board denied the petitioners' motion for a hearing before itself in advance of hearings, but decided the case without acting on petitioners' request for a hearing by the Board itself in "any further proceedings herein." By an order made only the day before the hearings began (R. 143), the Board refused any hearing as to the question of jurisdiction before the case should be heard generally (R. 33-39), and never granted the requested hearing before itself, as to jurisdiction or anything else. The petitioners participated in the hearings with full reservation of rights at all times (R. 19-21, 42-63, 135).

The answer of the Companies

The answer of the Companies (R. 42-62) was filed on June 16th (R. 63, 802, 803). It related to the complaint as amended to June 14, 1937 (R. 42). It contained appropriate denials and raised the jurisdictional questions also by affirmative defenses (R. 59-60).

The Companies' recognition of the Brotherhood and negotiation of collective bargaining contracts with the

Brotherhood had been announced to the employees and to the public press on April 20th (R. 1204-1205). The first two of these contracts had been executed on May 28th (R. 1229). On June 9th, counsel for the Board asked that the Companies furnish copies of the contracts recently executed (R. 868). On June 16th, counsel for the Board asked on the record that the contracts and correspondence be produced (R. 869). This was done; the correspondence and a typical contract were produced and marked, on June 16th (R. 870-874; Board's Exhibit No. 14). Subsequently, as arranged, a printed copy of each of the contracts was marked in evidence (Exhibits Nos. 17-22).

The answer filed by the Companies on June 16th referred to the contracts with the Brotherhood as follows (R. 58):

> "Respondents further allege that, since April 20, 1937, they have severally negotiated collective bargaining agreements with the International Brotherhood of Electrical Workers and their respective local unions of that labor organization, in behalf of such employees of the respondents as belong to the International Brotherhood of Electrical Workers and such local unions, and that the membership of such local unions is believed by the respondents to represent more than a majority of the employees of each respondent. Such labor agreements negotiated with the International Brotherhood of Electrical Workers have in most instances been executed by and in behalf of both the respondents and the International Brotherhood of Electrical Workers and its local union, but in a few instances are in course of execution at the time of this Answer."

Although the existence and nature of the contracts were well known to the Board, and were before the Board, virtually throughout the hearings (which did not close until July 6th), the Board did not at any time amend its complaint so as to refer to the contracts or state any issue as to them, nor did the Board cause any statement to be made by its Trial Examiner or by its counsel, which would give any information of an intent on its part (if such an intent were then

entertained) to declare the contracts invalid and in effect dis-establish the Brotherhood as the collective bargaining agency for employees "who are members of the Brotherhood" (R. 1295, 1745).

On the last day of the hearings (July 6th), the Board allowed itself, at the request of its trial counsel, an omnibus further amendment of its complaint (R. 1196); but even then the complaint made no claim against the contracts. Likewise, it stood as the *undisputed* testimony, as the Court below found (R. 1745) that as of June 29th the Brotherhood and its Local Unions comprised eighty per cent (30,000 out of 38,000) of the Companies' eligible employees (R. 1418). In view of the state of the record and the Board's "last-minute" amendment of its complaint, the Companies asked and obtained leave to amend their answer so as to plead, as a third defense (R. 60, foot-note), that the making of these contracts had rendered *moot* the charges of coercion, restraint, etc. (R. 1200-1201).

The statutes pertinent to the Board's claim of jurisdiction

Any authority which the Board may assert and exercise as to the petitioners would arise from the following provisions of the Act:

Section 10(a) provides that "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce * * *."

Section 2(6) defines "commerce" as "* * * trade, traffic, commerce, transportation, or communication among the several States * * * or between any foreign country and any State * * *".

The term "affecting commerce", as used in the Act, is undertaken to be defined (or broadened) in Section 2(7) to mean "* * * in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or

tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce".

The jurisdictional issue here

The record and the Board's cross-petition[1] (R. 83-85, 1703-1705) seem to us to make clear that the Board bases its claim of jurisdiction over the petitioners upon the possible effects which a possible interruption of the petitioners' service might have upon *interstate commerce carried on by others*, in that:

> (1) Although the petitioners do not themselves sell or transmit anything in interstate or foreign commerce and their service is not resold by others in such commerce, some of the petitioners' *customers* are engaged in part in interstate or foreign commerce, including several interstate railroads and certain governmental agencies, and that these customers and *their* interstate commerce are to some extent dependent upon the continuity of the petitioners' service, for the carrying on of their operations;
>
> (2) A substantial part of the raw materials, such as coal and oil, which the petitioners use in producing the electricity, gas and steam which they sell locally in the City of New York and adjacent Westchester County is produced or fabricated outside of the State of New York and is shipped *by others* in interstate commerce to the petitioners, for their local consumption in producing local utility service, none of the *petitioners'* employees being claimed to be engaged in interstate transportation of goods; and
>
> (3) Although there was no evidence that the alleged unfair labor practices with which the petitioners were charged had caused any burden upon or obstruction of interstate commerce, and although there was no evidence that the matters complained of

[1] On the question of jurisdiction, the Board's asserted jurisdiction should be tested by the factual grounds alleged in its petition for enforcement (*Levering & G. Co. v. Morris*, 289 U. S. 103, 105).

> would cause any actual obstruction or interference with interstate commerce, the Board has been authorised to vest itself with jurisdiction over the petitioners and their local activities by making the *three-fold assumption* that if the practices were not stopped they might cause a strike, the strike might suspend the petitioners' service to some extent, and that such a suspension of the petitioners' service might affect interstate commerce carried on by others.

In its brief in opposition to the petition for a writ of certiorari in this cause, the Board stated its view of the jurisdictional question as follows (page 2):

> "Whether the National Labor Relations Act may validly be applied to a public utility system engaged in the business of distributing electric energy, gas, and steam wholly within the State of New York, which receives the major portion of the raw materials, supplies, and equipment used in its production operations from States other than New York, and which sells substantial quantities of electric energy, gas and steam to various important private and governmental enterprises engaged in interstate and foreign commerce, including agencies and instrumentalities of such commerce, which are dependent in their operations upon the uninterrupted supply by petitioners of electric energy, gas or steam."

The above statement is significant, but hardly complete. The facts that the petitioners carry on their business of public service "wholly within the State of New York," and do not sell or deliver anything outside the State of New York, and do not themselves transport in interstate commerce such materials as they buy from sources outside the State of New York, should, we think, be supplemented by the established evidence that the petitioners are local operating public utility companies supplying service predominantly for residential and domestic uses, to the inhabitants of one large city and an adjacent county, all within the State; that the marked predominance of the local and State interest is

manifest in many ways; that the State of New York already exercises plenary and most comprehensive jurisdiction, regulation and supervision over virtually every phase of their business and operations, including a State Labor Relations Act which is inclusive of the provisions of the National Act and intended to apply to employers, like the petitioners, who are doing an intra-state business in New York; and that no inadequacy of the State regulation of labor relations or need for superseding it with Federal control, has been shown.

The Court below stated the facts and pointed the jurisdictional issue as follows (R. 1739-1742):

> "The terms 'commerce' and 'affecting commerce' are defined in Section 2(6) and (7), 29 USCA sec. 152. *It is not contended that the petitioners are themselves engaged in commerce as so defined. They are local public utility corporations and their production and distribution of electricity, gas and steam are carried on solely within the City of New York and adjacent Westchester County.* • • •
>
> "The parent corporation and each of its subsidiaries, with one exception, is *a public utility company within the meaning of the Public Service Law of New York* and is subject to regulation by the State Commission. The one exception is Consolidated Telegraph and Electrical Subway Company, which maintains and leases to others of the petitioners space in sub-surface ducts. *The petitioners' labor relations are also subject to State regulation under a recent statute (Ch. 443, Laws of 1937), unless jurisdiction of the State Labor Relations Board must yield to that of the National Board.* • • •
>
> "The petitioners argue that they should not be chargeable for the independent acts of customers whom, by State law, they are compelled to serve. But the problem is not to be approached from the standpoint of vicarious liability. • • •
>
> *"It is true that the local consequences of a cessation of the petitioners' services would be equally, if not more, disastrous.* It is argued that considerations of the health, safety and convenience of the

> millions of people who live and work in New York City outweigh the National interest in protecting interstate commerce from disruption; that local public utilities have always been regarded as exclusively within the jurisdiction of the States, and that to extend the Federal jurisdiction to include them is to obliterate *pro tanto* our dual system of government, contrary to the admonition of the Chief Justice in the *Jones & Laughlin* case. We are not unmindful of the persuasive force of these arguments. Nevertheless, we cannot doubt the power of Congress to legislate with respect to local utilities the disruption of whose service would have a direct effect upon interstate commerce * * *". (Italics ours.)

The Court below concluded (R. 1742) that

> "None of the Labor Board cases decided by the Supreme Court has presented a situation like that at bar."

The Board's decision as to the petitioners

After hearings as to which the facts will be stated hereinafter (see especially pages 26 to 38, *post*), the decision, findings, conclusions and order of the Board (R. 65-130) found against the petitioners as to jurisdiction and on all of the counts of its complaint, except that it dismissed without prejudice (R. 130) so much of the complaint as alleged any violation of Section 8(2) of the Act, which makes it an unfair labor practice "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *." The charge and complaint first made, of "dominating" or contributing "financial or other support" to the Brotherhood. was not sustained and was thereby eliminated from the case (R. 130).

The Board's order required the reinstatement of the six employees with back pay and the doing of various other affirmative acts and things which may best appear from the text of the order (R. 127-130).

The stipulated facts as to the petitioners—their business operations—their customers

Who are the petitioners? What do they do? Who are their customers? The facts from which jurisdiction is to be determined were stipulated (R. 144, 151, 1318-1388):

(1) The petitioners are domestic corporations organized under the laws of the State of New York (R. 1321, 1323-1324), and as public utilities are authorized to do business only within that State (R. 1321-1325; *Transportation Corporations Law of the State of New York, Section 10*).

(2) They neither own nor operate nor control, directly or indirectly, any item of plant or equipment outside the State of New York (R. 1325-1339, 1366-1367). They buy no electric energy, gas or steam from outside the State of New York (R. 1360-1361).

(3) They sell and deliver all of their service exclusively and entirely within the State of New York (R. 1339) to local consumers (R. 72-73).

(4) They sell and deliver their service wholly within the State of New York, to *retail* consumers on demand (R. 1322, 1343-1346, 1373-1387) and to some *wholesale* customers—such as apartment-house owners or office-building owners who buy from the petitioners and sub-meter the service to their several tenants (R. 1373, 1375).

(5) They neither sell, nor offer for sale, nor agree to supply, any service for resale by anyone outside the State of New York (R. 1339).

(6) They buy, *for their own consumption exclusively* in producing local utility service (R. 1364-1372), such consumable goods as oil, coal, copper, service trucks, waste,

paint and varnish, and miscellaneous supplies. Some of these supplies are delivered in New York from points of production or fabrication outside the State of New York; some of them have their origin within the State of New York (R. 1366-1367, 1369, 1371). All deliveries are made by enterprisers other than petitioners (R. 1368-1371), and none of petitioners' employees is engaged in any function of the interstate transportation of such materials (R. 1368).

(7) The petitioners sell and deliver within their respective local franchise territories in the City of New York and Westchester County, their local service to more than 3,500,000 electric and gas customers (R. 1343-1345), the great majority[1] of whom concededly use the service for residential and domestic purposes (see Paragraph 15 of the Petition for Review, admitted by the Board in its Answer; R. 1479, 1692). Other customers use the petitioners' service for light, heat and power in their processes of producing commodities which may be distributed, in part or in whole, outside the State of New York (R. 1375-1387). It is also probable that the petitioners supply service to customers who use the service in their business as sub-jobbers and sub-contractors of others who, in turn, may be engaged in production partly or wholly for out-of-state distribution. The ramifications of the use of their service by others are necessarily far-reaching.

(8) The petitioners supply their service on demand, at delivery points exclusively and entirely within the State of New York, to several consumers which are railroad corporations (R. 1383-1386). Some of these customers are engaged in intra-state and interstate transportation of passengers, freight and express (R. 1383-1386), but such customers purchase and receive, within the State, such quantity and kind of service as they choose, and in some cases at least they have other sources of supply (R. 1383-1386).

[1] See page 18, *post*.

(9) The petitioners sell their service locally to City, State and Federal governments (R. 1375-1377, 1383, 1386-1387), and these agencies of government use it to light the public streets, by-ways, and public buildings, to light and otherwise implement the local establishments of police and fire protection, and to light the way of the postal service and the garages where the delivery equipment of these agencies is repaired and maintained (R. 1375-1377, 1383, 1386-1387).

(10) The petitioners sell their service locally to customers who use it to light harbors (R. 1383, 1387), to accommodate ferries, piers and boat landings (R. 1382-1383, 1387), and to customers who use it in the production of newspapers and other publications (R. 1382) and to customers who generate and distribute ether waves upon which messages may be broadcast by the customers of such customers (R. 1379).

(11) The petitioners supply local customers within their franchise territory, who use the service to light and otherwise implement the operation of airports, news tickers, to transmit quotations of stock and produce exchanges, and to facilitate telephone and telegraph services (R. 1377-1378, 1380-1382).

(12) In the course of generating gas, steam, and electricity the petitioners recover some by-products which have a market value (R. 1372). The petitioners sell and deliver these by-products to manufacturers and jobbers in the City of New York, and credit the proceeds against their production costs (R. 72, 1372-1373).

(13) The customers of the New York Steam Corporation are all retail consumers located within limited areas of the Borough of Manhattan, New York City. Steam is supplied also, within the City of New York, to the Pennsylvania Railroad Company, which the latter uses to operate its

switches in its tunnel under the Hudson River (R. 1350-1351).

(14) The only business of the Petitioner Consolidated Telegraph and Electrical Subway Company is that of leasing space in sub-surface ducts, which it owns and maintains under its contract with the City of New York (R. 1322). It does not generate, transmit or sell any electricity, gas or steam to any one (R. 1322, 1324-1325).

The petitioners' customers predominantly residential and domestic

Of the petitioners' 2,324,800 electric customers (all located within the City of New York and adjacent Westchester County), approximately 1,896,800, or 81 per cent, are *residential* consumers (R. 1373, 1375). Approximately 427,100 are *commercial* consumers (R. 1343-1351, 1373). These commercial consumers consist of the "wholesale" customers mentioned in Paragraph "(4)" above and the many thousands of small factories and like establishments, wholesale and retail shops, restaurants, hotels, churches, schools, charitable institutions and hospitals within the petitioners' respective local franchise territories (R. 1343-1351, 1373).

The proportion of *residential* consumers among the petitioners' gas consumers is even higher than the 81 per cent among the electric users (R. 1344).

Less than two per cent of petitioners' revenues derived from sales to railroads

To railroad customers, the petitioners' total sales of electric energy in 1936 amounted to 376,800,766 kilowatt hours. Petitioners' total sales of electric energy for the same year totalled 5,130,976,460 kilowatt hours. Revenues derived from these sales to railroads amounted to $3,-

112,902.92; total electric revenues for the same year amounted to $180,885,041.65 (R. 1347).

In terms of percentages, 7.34 per cent of the petitioners' total sales of electric energy was to railroads; only 1.72 per cent of their total revenues from sales of electric energy came from the railroads.

The implications of the functional dependence of others as a test of Federal jurisdiction

The foregoing summary is an inclusive statement of the petitioners' relation to interstate and foreign commerce. It shows a relation which, as we shall point out more fully, is duplicated by that of nearly every other local operating utility company in every other community in the United States. It shows a relationship which, in kind and in principle, obtains also with nearly every other intra-state supplier of goods or services to customers who, in turn, are engaged in interstate commerce.

No one will doubt or deny the *functional dependence* of many or most of the petitioners' residential, domestic, and commercial customers upon the continuity of petitioners' operations and service. The same functional dependence is equally immediate and real as to every consumer of utility service in every single town, hamlet and community in the United States which relies upon the electric or gas service supplied by a utility company, whether privately or publicly owned or operated. Customers who themselves engage in interstate commerce or are instrumentalities of interstate commerce create no variant situation. Rare indeed is the local operating utility in any town, hamlet or community of the United States which does not buy from others substantial quantities of materials and supplies which originate at production points outside its State.

The comprehensive regulation of petitioners' business by the State of New York

As fully appears from the record in this case (R. 1324-1325, *et seq.*), each of the petitioners (except Consolidated Telegraph and Electrical Subway Company) is a "public utility company" as defined in Section 2, subdivision 22, of the Public Service Law of the State of New York, *which was made a part of the stipulation as to the jurisdictional facts* (R. 1374). Each of the petitioners which is a "public utility company" is subject to the jurisdiction and regulatory powers of the Public Service Commission of the State. Each of them, except New York Steam Corporation, is also a "gas corporation" or "electric corporation" or "gas and electric corporation" as defined in Section 24 of the Public Service Law of the State. New York Steam Corporation is a "steam corporation" as defined in Section 78 of the Public Service Law.

As public utility corporations, the management and operations of the petitioners are at all times subject to active, continuing, and comprehensive supervision, regulation and inspection by the Public Service Commission as provided in the Public Service Law of the State of New York.

The petitioners which are "gas corporations" or "electric corporations" or "gas and electric corporations" are subject to State regulation with respect to "the manufacture, conveying, transportation and furnishing of gas * * * for light, heat, or power" and with respect to "the generation, furnishing and transmission of electricity for light, heat, or power" (Section 64).

They "shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable," and "all charges" for service shall be no more "than allowed by law or by Order

of the Commission" (Section 65, subd. 1). All rebates and all discriminations in services or charges, and all undue preferences or advantages to persons, localities, or in services rendered, are prohibited (Section 65, subds. 2, 3).

Although the petitioners may establish "classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use or upon any other reasonable consideration" and may provide "schedules of just and reasonable graduated rates applicable thereto," no such "classification, schedule, rate or charge shall be lawful unless it shall be filed with and approved by the Commission." Furthermore, "every such classification, rate or charge shall be subject to change, alteration and modification by the Commission." (Section 65, subd. 5).

In furtherance of its "general supervision" of these petitioners, the Commission is empowered to "investigate and ascertain, from time to time" what is "the quality of gas supplied" and the "methods employed * * * in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same." It is vested with further power "to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof." It is empowered "to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property" of these corporations (Section 66, subd. 2). It may by order "fix and change from time to time standards of the purity, illuminating power and heating power * * * of gas" and standards for the measurement thereof and "prescribe from time to time the efficiency of the electric supply system, of the current supplied and of the lamps furnished" and "prescribe from time to time the reasonable

minimum and maximum pressure at which gas shall be delivered" by the petitioners (Section 66, subd. 3).

To assure the continued, faithful performance of any of its foregoing orders by the petitioners, the Commission is empowered "of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying gas or electricity" and is given access "to all parts of the manufacturing plants owned, used or operated by [for] the manufacture, transmission or distribution of gas or electricity" (Section 66, subd. 3).

The Commission is authorized "in its discretion, to prescribe uniform methods of keeping accounts, records and books * * * forms of accounts, records and memoranda to be kept" and "any other and additional forms of accounts, records and memoranda kept by such corporations shall be subject to examination by the Commission" (Section 66, subd. 4).

The Commission is also empowered to "examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business" and if, after hearing, it shall be of opinion that "the rates, charges or classifications or the acts or regulations of any such person, corporation, or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential * * * the commission shall determine and prescribe * * * the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished notwithstanding that a higher or lower rate or charge has heretofore been prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement, and the just and reasonable acts and regulations to be done and observed" (Section 66, subd. 5).

Similarly, if it shall find that "the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the Commission shall determine and prescribe" what is "thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters" (Section 66, subd. 5).

Annual and interim reports are required to be filed with the Commission which shall show in detail the business operations of these petitioners, their capital structures, and changes therein; the officers, and what they are paid; the amount paid as wages to their employees, and "such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission" (Section 66, subd. 6).

Many other supervisory powers and duties as to the petitioners are vested in the State Commission. See, for example, Section 66, subd. 9; Sections 67, 69, 69-a, and 70, of the Public Service Law.

Local franchises also frequently stipulate and make further conditions as to how the petitioners' operations shall be conducted (R. 1323-1324).

Although the foregoing summary of the control over petitioners which are "public utility companies" is taken from the provisions of the Public Service Law of the State of New York relating to gas and electric corporations, substantially similar provisions are made respecting the supervision, regulation and inspection of steam corporations in Article 4-a of the same law.

Such is the business of the petitioners over which the State of New York has established a complete and detailed

system of regulation—a system of regulation involving day-by-day inspection of the safety and quality of their service and of the sufficiency of their plants and equipment. This system functions as part and parcel of the health and sanitary services, the police and fire protective services, and the general welfare services, of the City and State of New York.

The New York State Labor Relations Act

In addition to its regulatory system provided in the Public Service Law (and in local franchises), the State of New York has enacted also its own Labor Relations Act to which the petitioners are subject, "unless", as the Court below pointed out, "jurisdiction of the State Labor Relations Board must yield to that of the National Board" (R. 1739).

The New York State Labor Relations Act was enacted May 20, 1937, effective July 1, 1937 (Chapter 443 of the Laws of 1937; Article 20 of the Labor Law), in the "exercise of the police power of the State for the protection of the public welfare, prosperity, health and peace of the people of the State" (Section 700 of the Labor Law).

The New York State Labor Relations Act is all-inclusive of the provisions of the National Act, and was enacted for the purpose of extending to the labor relations of employers engaged in local, intra-state enterprises within the State of New York a supervision similar to that designed by the National Act with respect to employers in interstate or foreign commerce.

State's plenary regulation showing local interest predominant

In the instant case, the National Board and the Court below have held, in effect, that, although the petitioners are engaged only in a local, intra-state business *so situated and conducted as to be completely within the authority and*

powers of the single State, the jurisdiction of the State Board over them must give way to that of the National Board, *even though there is and could be no evidence of any inadequacy of the State Act, or of the administration of the State Board, which is, or might be, prejudicial to interstate or foreign commerce.*

We have set forth the pertinent laws of the State of New York to show how thoroughly its legislature (and local franchises) have provided for the supervision, regulation and inspection of the petitioners; how completely and in detail the State has provided for the protection of petitioners' consumers and employees; how its system of control and protection is implemented by the supervision of its Public Service Commission and the State Labor Relations Board—supervision which involves day-by-day investigations and inspections of the quality of petitioners' service and the efficiency of their plants and operations, and the verification of their just and fair dealings with consumers, and the assurance of their fair practices toward their employees.

This regulatory system has been provided by the State of New York to insure the safety, comfort, convenience, health and welfare of those who may rightfully claim such protection from the sovereign State of New York. It is an integrated and indispensable part of the health and sanitary services, the public welfare services, and the police, fire and safety services, of the State of New York.

No one should be heard to urge that the State of New York has misconceived its powers or functions in providing such protection. The necessities of the homes, hospitals, schools, libraries, transportation agencies, offices, hotels, restaurants, shops, factories and manufacturing establishments within its borders, and of its fire and police departments and public streets, are justly protected. No one realizes more than these petitioners that the quality and efficiency of the service which they supply, the continuity of that serv-

ice, and the just and reasonable rates at which they supply it, do vitally, immediately and directly affect the health, safety and necessities of the people of the City and State of New York, so as to justify the systematic and continuing, protective supervisions which the State has provided.

The combination of facts showing the denial of a full and fair hearing and impartial determination according to the substantial evidence

Aside from the question of jurisdiction, the petitioners maintain that the Board did not accord to them a full and fair hearing and an impartial determination according to the substantial evidence, and that a series of incidents of vital consequence during the hearings and subsequent proceedings, including the very quality of the Board's testimony, reveal clearly and substantially that under the direction of the Trial Examiner by the Board *ex parte* and *in absentia*, the hearing and determination were arbitrary and lacking in due process. Taken in conjunction and cumulatively, as well as separately, these aspects of the hearings and decision are deemed to be so prejudicial as to call for the setting aside of the Board's order (see Questions Presented, "(3)" to "(7)"; Specification of Errors, "(3)" to "(8)".

The Court below expressed pointed criticisms as to several matters; e. g.:

> "This procedure is not one likely to inspire confidence in the impartiality of the proceedings. It results in the findings of fact being made by persons who did not see the witnesses—a matter which may have far reaching consequences in view of the very limited power conferred upon the courts to review the Board's findings of fact. But, though we do not commend such procedure, we cannot say that it has deprived the petitioners of due process of law. * * *" (R. 1743)

"It is not so clear, however, that invalidating the contracts is an appropriate order against the petitioners. * * *" (R. 1745)

"We cannot say that the record is wholly barren of evidence to support the charge that they [the six men] were discriminated against on account of union activities. * * *" (R. 1746)

"Denial of leave to introduce it [additional testimony offered by the Companies through witnesses present in the hearing room] appears to us unreasonable and arbitrary. However, the petitioners have not applied to this Court for the taking of additional evidence, as they might under Section 10(e)." (R. 1747)

Questions of the essential fairness or unfairness of *quasi*-judicial proceedings, going as they do to the very heart of the judicial function, may be determined best by examining thoroughly the record of the proceedings. To aid, we summarize the salient facts, with references to the transcript:

The taking of evidence before the Trial Examiner began on June 3rd (R. 133, 144, 151). Hearings were continued on June 10, 11, 14, 15, 16, 17, 23 and 24, 1937, and were concluded on July 6, 1937. Some twenty-eight witnesses were called and examined in behalf of the Board, and twenty exhibits were received in its behalf, consisting largely of documents produced by the Companies at the Board's request (see list of exhibits, pages v to xi).

The Board's *ex parte* direction that the Trial Examiner refuse to hear witnesses present in the hearing-room

On June 23rd, as on other days, the Companies produced at the hearing-room numerous witnesses asked for by the Board and had a larger number subject to call when the Board wanted them, in lieu of formal subpoena. Late in the afternoon of that day (R. 1102), counsel for the Board indicated for the first time that "we could get the remaining

witnesses here tomorrow and we probably would be in a position to close tomorrow" (R. 1102). On that day and the following day, a large number of witnesses who had been requested by the Board were not called but were excused (R. 1188); and on June 24th the Board's case was "completed, aside from the one matter in respect to which it is kept open" (R. 1186). Counsel for the then respondents said frankly: "no one on respondent's side, was aware until yesterday afternoon that this proceeding was likely to terminate today or this week" (R. 1188). It was agreed that the making of motions by either side, "addressed to any part of the record", might be left open "until we have had a chance to examine this rather voluminous record" (R. 1186). A substantial amount of further documentary evidence which the Board wished to offer was also to be prepared by the petitioners (R. 1184-1185) and adduced on the adjourned date, as was done (R. 1195).

Because of the unexpected closing and the absence of two essential witnesses, as well as on other substantial grounds stated (R. 1186-1193), counsel for the Companies asked for a recess until July 6th, at which time there should take place the completion of the Board's case, the making of motions by both sides, and the presentation of the testimony for the Companies, including that of Messrs. Carlisle and Dean, who by reason of absence could not be available sooner (R. 1188, 1192). It was stated that "the direct examination of all witnesses in behalf of the respondents would not occupy more than a day" (R. 1192).

The Companies' request was immediately referred by the Trial Examiner for decision through "telephone conference" (in which counsel for the Companies had no part), by the Board or some member thereof in Washington (see R. 1187, fol. 3561; 1189, fols. 3567-3568; 1191, fol. 3573). No member of the Board had been present at any of the hearings or had heard or seen any of the witnesses. The hearings had been conducted by the Trial Examiner and by the regional attorney for the Board, who alone could be familiar with the testimony and the situation. Regional

counsel for the Board did not oppose the request that the Companies' case, as well as his own, be held over until July 6th. He said:

"I have nothing to say" (R. 1190).

Nevertheless in obedience to his instructions from persons who had not been present at any hearing, the Trial Examiner limited the adjourned hearing (on July 6th) to the completion of the Board's case, the making of motions, and the taking of the testimony of only one witness (Mr. Carlisle) for the Companies (R. 1192-1193), although they were told that they might petition the Board for permission to call more than the one witness (R. 1192).

The petitioners took up the matter with the Board (R. 1309, 1545), and the record contains the full correspondence between the secretary of the Board and petitioners' counsel (see R. 1545-1553). The correspondence tells the story, and shows also that the Board or its secretary greatly misapprehended the situation before the Trial Examiner (see R. 1550 and 1552).

The Trial Examiner had fixed no *intermediate* date for taking the testimony of Mr. Dean or any other witnesses, and the matter went over until July 6th by general assent (R. 1192, 1311). There was no direction that testimony other than that of Mr. Carlisle should be taken at any other time. On July 6th, counsel for the Board completed his case with further documentary evidence (R. 1195), and made an omnibus motion to amend further his complaint (R. 1196), of which motion he had given no notice. This motion once more to amend the complaint was granted (R. 1196-1197). Counsel for the Companies then made various motions (R. 1198-1201), and counsel for the Board offered his last exhibit for the Board (R. 1202; Exhibit No. 20).

The testimony of Mr. Carlisle, who was in Europe at the time of the recess on June 24th, and the testimony of Mr. Harold Dean, who was out of the State on June 24th

(R. 1188) were then permitted and taken. Correspondence with the Board as to further testimony was received (R. 1309; Exhibits Nos. 25 and 25-A). When counsel for the Companies called a further witness, the Trial Examiner declined to let him testify. The Trial Examiner said (R. 1309):

> "In view of the ruling of the Board, I am afraid that——".

Counsel for the Companies pointed out that the Board had completed its case only that morning, and that the matter was substantially affected by the further amendment of the complaint, allowed without notice and only that morning (R. 1196, 1312). He pointed out also that the proffered testimony of two witnesses present in the hearing-room related to the discharge of an employee not named in the charge or complaint (R. 1313). Nevertheless, the Trial Examiner felt bound to adhere to his *ex parte* instructions received by him from the Board in Washington, D. C.; he would not even accept a suggestion by the Companies that the testimony be taken, without prejudice, so it would be before the Board and any reviewing Court (R. 1312). He said:

> "I am afraid I consider myself bound by the decision of the Board in respect to eliciting testimony." (R. 1312).

So an offer of proof was made (R. 1314-1315), as to what would be the testimony of the two witnesses present in the hearing-room.

As to the above matters, the Court below said (R. 1747):

> "The Board unexpectedly completed its proof on June 24, 1937. Counsel for the petitioners was unready to go on and obtained a continuance in order that Messrs. Carlisle and Dean, who were absent from the city, might testify on July 6th. The Examiner and the Board (by letter) declined to let any other witnesses testify on that date. Counsel offered two of Solosy's supervisors to testify to the reasons for his discharge and to the fact that the men who were

retained in preference to him were better educated and better trained. These witnesses were at hand, their testimony would have been short and would have entailed no appreciable delay in closing the hearings. It was vital testimony on the issue of the petitioners' motive in discharging him. Denial of leave to introduce it appears to us unreasonable and arbitrary * * *".

The long delay of determination following such refusal to take testimony

Although the case was thus closed on July 6th under apparent pressure as to time, the Board took no action until nearly three months later (September 29th), when it transferred the case from the Trial Examiner to itself; and the Board waited more than a month more, more than four months in all, before deciding the case,—this after refusing to hear testimony which would have taken a few hours.

The foregoing course of events by which the petitioners were prevented from presenting substantial elements of their case in refutation of the Board's testimony took place by virtue of directions given to the Trial Examiner by Board members or employees who had not been present, had not heard or seen any of the witnesses, and had no first-hand knowledge of the status of the trial.

The Board's transfer of the proceedings away from the Trial Examiner who heard the evidence

A further specification in support of the petitioners' contention that a proper hearing and determination were denied by the Board, is furnished by the following facts, in conjunction with the others stated:

On September 29, 1937, nearly three months after closing the hearings, the Board issued its order that "this proceeding be transferred to *and continued before the Board*" (R. 64). The petitioners had no prior notice of this order or

opportunity to be heard as to it. A copy of it, when made, was mailed to the petitioners (R. 1502-1503).

The petitioners never received further information from the Board, or otherwise, as to the status of the proceedings, until the Board published its decision, findings, conclusions and order against the petitioners under date of November 10, 1937 (R. 65-130).

So there was no intermediate report nor findings by the only person who saw the witnesses and heard their testimony, and the petitioners were given no opportunity to be heard by and before the Board, as to any proposed findings or any intermediate report as contemplated by the Board's Rules, or otherwise.

In the Board's brief in opposition to the petition for a writ of certiorari in this case, reference to the transfer and continuance of the proceedings before the Board is followed by this single comment (page 7): "No oral argument was had, *none having been requested by petitioners.*" The petitioners' *first step* was to ask the Board for an opportunity to be heard "directly by the Board" (R. 19-21). This was preliminarily denied by the Board (R. 38-39), and never at any time granted. Moreover, we read Section 37 of the Board's Rules as applying to a transferred proceeding the same provision for oral argument as of right as is recognized in Section 29 as to proceedings before a Trial Examiner.

A few days after the case before the Trial Examiner was closed, counsel for the petitioners submitted to him a brief, to aid his preparation of findings (R. 71, 1316). If he prepared any findings, the Board never made them public. If it is to be assumed that this memorandum came to the attention of the Board, we think that the submission of such

a memorandum to the Trial Examiner was no substitute for the requested opportunity to be heard by and before the Board and no substitute for the opportunity for oral argument provided by the Board's Rules.

The invalidation of the contracts without notice or statement of any claim against them

On April 20, 1937 (prior to the charge filed by the CIO affiliate on May 5th and the complaint served on May 12th), the Companies announced to their employees and to the public press their agreement with Mr. Tracy, President of the International Brotherhood of Electrical Workers, to enter into collective bargaining contracts with the Brotherhood in behalf of those employees who were members of the Brotherhood (R. 1203-1211, 1393).

Pursuant to this agreement, the petitioners severally entered into collective bargaining contracts with the Brotherhood. These contracts were completed and executed during the period between May 28, 1937, and June 16, 1937 (R. 100). At the request of the Board (R. 868-870), copies of each of these contracts were produced and placed in evidence (see list of exhibits, R. vi and x).

These contracts provide for (to quote from the Consolidated Edison Company contract applicable to gas workers, which is substantially identical with the other contracts):

> "* * * rates of pay, hours of work, and conditions of employment, and as to the methods of conducting collective bargaining between the parties as to questions which may from time to time arise, as will best promote and improve the economic welfare of employees of the Consolidated Company who are members of the Brotherhood and enable the Consolidated Company efficiently and economically to perform its obligations as a public utility and to furnish uninterrupted gas service in its territory" (R. 1419-1420).

These contracts provide further that the Companies recognize the Brotherhood as the collective bargaining agency *"for those employees who are members of the Brotherhood"* (R. 1420); that the Companies shall not interfere with the right of their employees to join the Brotherhood; and that they shall practice no discrimination, restraint or coercion against any employee because of his membership in the Brotherhood. The Brotherhood, in turn, stipulates "for itself and its members, not to intimidate or coerce employees into membership in the Brotherhood and also agrees not to solicit membership on Consolidated Company time or property" (R. 1420).

The Court below found (R. 1745), *and the undisputed evidence at the hearings showed* (R. 1212, 1418), *that the Brotherhood membership at the end of June included 30,473 out of 38,152 eligible employees of the petitioners (80 per cent).*

The Board either concealed its purpose or annulled the contracts as an after-thought

In order to justify the vacating of the Board's order as to these contracts, it is not necessary to determine whether the Board's course of action was the product of a deliberate purpose and design *not to reveal* its claims and intentions with respect to the contracts, or whether the determination by the Board to void them was *an after-thought conceived and executed without notice or opportunity of hearing* to the petitioners, and, of course, without opportunity to make argument or to submit a brief upon the claims and contentions of the Board respecting those contracts. The Board may interpret its action on either basis; in either event, there was not due process of law.

To us it seems probable that the annulment of the contracts was an *after-thought* and was not disclosed because it was not in mind. In any event, neither as first served nor

as at any time amended did the complaint state any issue as to, or even mention, these contracts, although the complaint was last amended on July 6th and the last contract had been executed on June 16th. Neither the Trial Examiner nor counsel for the Board ever stated any issue against the validity of the contracts or gave any notice that such a question was to be determined by the Board. Counsel for the Board several times said that the complaint was not "directed against the Brotherhood" (R. 279-285) and that "no issue of representation [is] involved in this proceeding" (R. 279, 525-526).

The Court below was under a misapprehension that "the contracts were introduced by the petitioners in support of a contention that the issue of coercion of employees was thereby rendered moot" (R. 1745). As shown by citations of the record on pages 8 and 9 and 33 to 35; *ante*, the contracts were produced and put in evidence only at the request of counsel for the Board; and it was only after counsel for the Board had closed his case and had obtained from the Board on the last day (R. 1196) an omnibus further amendment of the complaint without previous notice and over objections, that the petitioners moved to amend their answer and set up as a separate defense that the contracts in force with Local Unions representing much more than a majority of the employees (contracts in no way attacked in the complaint or on the hearings) had rendered *moot* the charges of unfair labor practices involving interference with and coercion of petitioners' employees (R. 60, 1200-1201).

The invalidating of the contracts tended to further, not prevent, industrial strife

The Board made no finding, and there was no evidence to support a finding, that continued observance of these contracts endangered the continuity of petitioners' operations or service to their customers, or that they had effected,

or were likely to effect, any labor dispute burdening or obstructing commerce.

These contracts with a substantial majority (80 per cent) of the petitioners' employees (R. 1418) were and are of vital importance to the petitioners, who are charged by the State and City of New York with responsibility to render *continuous* service to all of their customers, of whom more than 80 per cent are residential and domestic customers. Each of these contracts stipulates against resort to strikes or lock-outs, provides for the arbitration of all disputes which cannot otherwise be settled, and provides for such arbitration without cessation of work or employment (R. 139, 1428-1429), thereby giving a substantial practical assurance of the maintenance of the uninterrupted operations and service of the petitioners. It is a matter of public knowledge in the City of New York, and is shown by the papers in the Court below, that these arbitration provisions were invoked to settle a labor controversy involving the laying-off of several hundred men for lack of work, and that the dispute was thereby ended without any disturbance of service.[1]

The Board contends that its assumption of jurisdiction is essential or appropriate to prevent possible labor disputes, among the petitioners' employees, which might disrupt the continuity of petitioners' operations and so burden commerce. Yet the Board enters upon its assumed jurisdiction and at the same time undertakes to nullify contracts under which 30,000 employees (80 per cent of the total eligibles) have bound themselves to arbitrate all disputes and to stay at work pending arbitration. The Board has made no finding that if these 30,000 employees remained at work under these contracts, any labor dispute involving a rela-

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[1] *The New York Times*, December 16, 1937.

tively few employees[1] could suspend the petitioners' service. If assurance were needed against such an improbability, the best assurance which the petitioners and the people of the City of New York could have that the petitioners' service will not be interfered with by labor controversies, is these contracts which the Board would nullify.

The Brotherhood in effect "dis-established" by the Board's order

Nowhere in the complaint as first served, or as amended from time to time, was any question of *representation* under Section 9(c) of the Act put in issue. Indeed, counsel for the Board was explicit at the hearings in stating that no question of representation was involved in the proceedings (R. 279, 525-526), and that the complaint was not directed against the Brotherhood (R. 279-285). Nevertheless, for all practical purposes, the Brotherhood as well as its contracts were dis-established, by the order here under review.

The Board did this in disregard of the fact that it found that the petitioners had not offended Section 8(2) of the Act and therefore dismissed so much of the complaint (Par. 22) as charged that they had dominated, interfered with, or contributed support to, the Brotherhood (R. 130). As the Court below observed, this finding made the case unlike *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, in which the labor union was found to have been reared by the employer as a "company union." We point out also the conclusion of the Court below that, by reason of the other provisions of the Board's order, the invalidation of these contracts was *unnecessary* to give the petitioners' employees *"complete freedom to join United in preference to the Brotherhood or to join neither"* (R. 1746).

The record here shows, we submit, that in these respects, as in the others already stated, the Board acted with ap-

[1] The highest estimate that any of the Board's witnesses made as to the number of members of the United (the CIO affiliate) or its predecessor was related only to the predecessor and claimed at one time a maximum of about 1200 members (R. 390, 500-502), which would be about 3 per cent of the total eligibles. The undisputed testimony (R. 1418) was that the Brotherhood had, at the time of trial, 80 per cent of the eligibles.

parently punitive purpose and partiality against the petitioners and the Brotherhood, and that its order unnecessarily and improvidently confiscates their contracts, which were lawfully conceived and accomplished in furtherance of a very substantial public interest; namely, the continuity of their supply of service.

The absence of substantial evidence to sustain findings

As we shall show hereinafter, on such salient points as space permits, the Board arbitrarily disregarded the *substantial* evidence to the contrary of its findings on several issues, and made findings which are so insufficiently supported by evidence of any substantial probative value as to be arbitrary and contrary to law.

We contend that the Court below in effect abdicated or unduly declined its duty and power of judicial review, because of an erroneous assumption that it should sustain the findings of the Board unless "the record is wholly barren of evidence to support the charge * * *" (R. 1746).

The decision of the Court below

The opinion of the Circuit Court of Appeals speaks best for itself; it has been summarized sufficiently under the several headings hereinabove.

On the question of jurisdiction, it seems warranted to say that the Court below found this cause unlike, and uncontrolled by, any which this Court has decided (R. 1742). On the questions of due process, the Court below commented most unfavorably upon various elements of the Board's procedure and course of action (see R. 1743, 1747), but saw fit to say, apparently with reluctance, that none of these matters "deprived the petitioners of due process of law" (R. 1743).

Specification of Errors

(1) The Circuit Court of Appeals erroneously decided that the Act authorizes the Board to exercise its jurisdiction over the petitioners and over the matters complained of by the Board.

(2) The Court below erroneously decided that the provisions of the Act may be validly enforced against the petitioners under the Constitution.

(3) The Court below erroneously decided that the procedure whereby the case was transferred to the Board without any findings of fact or conclusions of law being made by the Trial Examiner who had heard the witnesses, and whereby the decision by the Board was made without notice or opportunity for the petitioners to be heard by the Board, or otherwise, with respect to any findings of fact or conclusions of law of the Board, was in compliance with the Rules of the Board and did not deny to the petitioners due process of law.

(4) The Court below erroneously decided that the rulings by the Trial Examiner and by the Board, refusing to hear evidence sought to be introduced in behalf of the petitioners, were valid and did not deny to the petitioners due process of law.

(5) The Court below erroneously decided that the order of the Board requiring the petitioners to cease and desist from giving any effect to their collective bargaining contracts with the Brotherhood is valid and does not deny to the petitioners due process of law.

(6) The Court below erroneously decided that the findings of fact of the Board were validly made and that they were sufficiently sustained by proper evidence, whereas the purported findings of fact upon which the Board asserted

and exercised jurisdiction were a series of assumptions and hypotheses unsupported by evidence.

(7) The Court below erroneously decided that the conclusions of law of the Board are valid.

(8) The Court below erred in holding that the National Act, as construed, applied and administered by the Board in this case, complies with the Fifth and Tenth Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT

1

As to Jurisdiction

The petitioners' operations, relations and labor practices are exclusively and entirely intra-state. The furnishing of gas, electricity or steam to local inhabitants concerns primarily and predominantly the health, safety, comfort, convenience and general welfare of the millions of people who reside and do business day-by-day within the City of New York and Westchester County. The petitioners' operations are such in their characteristics that, carried on wholly within a single State and traditionally subjected to plenary jurisdiction of the State, they are appropriately regulated and supervised as local concerns affected with a local public interest.

Brush v. *Commissioner*, 300 U. S. 352, 371;
Pacific Gas & Electric Co. v. *Sacramento Municipal Utility Dist.*, 92 Fed. (2nd) 365, 369; certiorari denied, 303 U. S. 640;
Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148, 154;
Missouri v. *Kansas Natural Gas Company*, 265 U. S. 298.

Because of the extent and immediacy of the functional dependence of the City of New York and Westchester County and the millions of their inhabitants upon the petitioners' services, the *local* interest in petitioners' uninterrupted supply of their services is, and should be recognized and preserved as, *predominant and paramount*. The petitioners' operations and labor relations are predominantly local rather than National because of the directness and immediacy of their relation to the health, safety, comfort, and convenience and general welfare of the people who live, reside and do business in the City and State of New York, and because of the dependence of the City and State of New York thereon in exercising their police powers for the main-

tenance of order and public convenience and the protection of the safety and well-being of their inhabitants.

Such National interest as may attend such local operations, relations and labor practices and relate to the prevention or removal of burdens or obstructions to "commerce", is essentially subordinate and requires no separate identification so as to serve as a basis for Federal regulation. The State and City of New York should accordingly continue to have the primary undivided power to regulate the petitioners' labor relations and practices, along with the other phases of petitioners' operations.

In view of this paramount local interest in petitioners' service and operations, and in view of the all-inclusive measures which are in effect under the laws of the State of New York, including the New York State Labor Relations Act applicable to concerns, like the petitioners, who are subject fully to the laws of the State, the exercise of Federal authority as here attempted by the Board is not "essential or appropriate" but is definitely contrary to the mandate of this Court that the exercise of Federal power under the commerce clause shall be exercised only upon "suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear," and must be supported by adequate evidence and findings of appropriate definiteness.

Florida v. *United States*, 282 U. S. 194, 211, 212;
Cf. *Pennsylvania* v. *Williams*, 294 U. S. 176;
Hopkins Savings Association v. *Cleary*, 296 U. S. 315.

The record here shows no compliance by the Board with the requirements of the principles of *Florida* v. *United States*. Clearly there was no evidence, and there is not one of the required findings, to justify the Board's attempted exclusion of State authority by extension of Federal jurisdiction over petitioners who otherwise are within the domain of State power.

There has been no burdening or obstruction of commerce by any interruption of petitioners' services because of any labor controversy. There is no evidence that any such interruption is likely from such a cause, or that a labor controversy involving petitioners' employees would be less likely under the Board's jurisdiction or would not be as effectively dealt with by the State Board. There is no finding of any inadequacy of the State jurisdiction and regulation of the petitioners' labor practices. In short, the grounds on which the Board asserted *need* for its jurisdiction were no more than a series of unsupported assumptions arising from wishful thinking on its part.

The various rulings of this Court under the Act are not decisive or controlling here. In those cases, the employer was itself engaged actively in interstate commerce, and the employer's business was organized and conducted predominantly as an enterprise in interstate commerce, beyond full control in all aspects by a single State. In none of the cases decided by this Court was the employer a local operating public utility affected predominantly with a local public interest and already subject to plenary jurisdiction by the State and locality, including regulation as to its labor practices. In none of the cases decided by this Court were a State Labor Relations Act and State Labor Relations Board in existence and functioning, as here; and, to reiterate, there is no finding here that the State Act and State Board have been, are, or might be, *inadequate* to protect the interstate commerce carried on by some of petitioners' customers from being burdened or obstructed by a suspension of petitioners' service because of a labor controversy with some of petitioners' employees.

Here is fairly the question whether "the authority of the Federal government" shall be

> "pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State."
>
> *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30.

The principles declared in *Florida* v. *United States*, *supra*, taken in conjunction with those stated in the *Brush* case and other recent decisions, seem to us to call for a denial of the jurisdiction here attempted by the Board.

2

AS TO THE BOARD'S DENIAL OF A FULL AND FAIR HEARING AND AN IMPARTIAL DETERMINATION ACCORDING TO THE SUBSTANTIAL EVIDENCE.

Taken together and given cumulative effect—this being the way such matters were experienced by the petitioners—various incidents of the proceedings in this case show unmistakably the withholding of a fair, full hearing and an impartial determination. Even if they stood alone, each of the incidents should be held, we believe, to constitute *pro tanto* a withholding of due process of law; in the aggregate and taken together, the intent and effects of the Board's course of action appear therefrom so clearly as to call for setting aside its findings and conclusions. Due process of law does not permit *all* of these things to be done to employers *in one proceeding*. We here specify *inter alia:*

(a) The arbitrary refusal and failure of the Board to give the petitioners an opportunity to be heard directly by the Board itself (see page 8, *ante*), which rendered the Board's order *ultra vires* Section 10 (b) of the Act.

National Labor Relations Board v. *Hopwood Retinning Company*, 97 Fed. (2nd) 97, 101;
Interstate Commerce Commission v. *Northern Pacific Railway Company*, 216 U. S. 538.

(b) The refusal of the Trial Examiner on June 24th, under *ex parte* instructions telephoned to him by some member or subordinate of the Board, to adjourn the hearing to permit any witness other than Mr. Carlisle to testify for the petitioners (see pages

27 to 29, *ante*); and the refusal of the Trial Examiner, again under *ex parte* instructions from the Board, to permit more than two witnesses (Messrs. Carlisle and Dean) to testify on July 6th, the closing day (see pages 29 to 31, *ante*), thereby refusing to hear witnesses present in the hearing-room; such "remote control" being exercised despite the fact that no member of the Board had attended any hearing or heard any witness or gained an accurate comprehension of what the situation was—and notwithstanding the fact that the Board had not completed its evidence until on that day and had *then* asked for and obtained without notice a blanket further amendment of its complaint (see pages 10 and 30, *ante*).

(c) The action of the Board in invalidating by its order the petitioners' contracts with the Brotherhood, although in neither the charge, the complaint, the numerous amendments of the complaint, nor any statement of the Trial Examiner or of counsel for the Board, was any issue as to the validity of the contracts raised or indicated. The petitioners had pleaded the existence of these contracts (R. 58); the contracts had been produced at the request of the Board (R. 868-871) and placed in evidence; but the Board had never raised or indicated any issue as to their validity, and was guilty of either intentional concealment of its claims as to them or of annulling the contracts upon an unlitigated issue brought into the case as an afterthought (see pages 33 to 37, *ante*).

Morgan v. *United States*, 304 U. S. 1;
National Labor Relations Board v. *Greyhound Lines*, 303 U. S. 261;
Shields v. *Barrow*, 17 How. 129, 139.

The case at bar, as to the contracts of the American Federation of Labor affiliate, is wholly different

from that before this Court in *National Labor Relations Board* v. *Greyhound Lines*, 303 U. S. 261, 270. There a "company union" was "dis-established" because it was "so organized that it is incapable of functioning as a bargaining representative of employees."

Here the contracts were with a recognized International Union. The Board repeatedly disavowed, on the hearings, any issue as to representation (R. 279, 525-526), any attack upon the Brotherhood (R. 285), or any challenge of the status of the Brotherhood as a bargaining agency (R. 279, 525-526).

The "charge" and the complaint alleged violation of Section 8(2) of the Act by the petitioners as to the Brotherhood (R. 4, 15), but the evidence in no way sustained this claim. The Board dismissed here the charge of "dominating" and "contributing financial and other support to the International Brotherhood" (R. 130), which the Court below deemed to distinguish the case from the *Greyhound Lines* decision (R. 1745).

(d) The Board proceeded to a final determination after it had "transferred" the proceedings away from the Trial Examiner and unto itself without notice and without having any findings made by the Trial Examiner who alone heard the testimony, and without affording the petitioners any opportunity to appear before it or be apprised of the Board's contentions, although the Companies had at the outset demanded a hearing before the Board itself (R. 19-21) and although the Board's own Rules (Sections 29 and 37) apparently required that when a case is "transferred" from the Trial Examiner and continued before the Board before he makes and files an intermediate report, a suitable opportunity for oral argu-

ment before the Board shall be allowed (see pages 31 to 33, *ante*).

National Labor Board v. *Hopwood Retinning Company, supra;*
Morgan v. *United States, supra.*

(e) The course of events as to the Board's repeated amendments of its complaint, without proper notice and without giving the petitioners an opportunity to meet the issues raised (see pages 6 and 7, *ante*).

(f) The Board disregarded the *substantial* evidence and based its findings on remote, vague and biased hearsay and rumor, to such an extent as further to confirm the inferences arising from the other matters above indicated (see Point III, *post*).

This course of action by the Board in the conduct of the proceedings constituted, in the aggregate and cumulatively, a denial of a full and impartial hearing and fair adjudication—a denial of the "inexorable safeguard which the due process clause assures".

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38, 73;
Morgan v. *United States,* 298 U. S. 468; id., 304 U. S. 1.

3

AS TO THE COURT'S STANDARD OR CRITERION OF REVIEW OF IMPORTANT FINDINGS OF FACT BY THE BOARD

As we shall show in detail under Point III, *post,* the Court below erred, we think, in its standard of judicial scrutiny or non-scrutiny of the Board's findings. It in effect *abdicated* its judicial functions in this field, to the

extreme of sustaining the Board's findings unless the record "*is wholly barren of evidence*" to support them. Such a test does not afford a judicial review of any substantial quality or efficacy.

> *Washington Coach Company* v. *National Labor Relations Board*, 301 U. S. 142, 143;
> *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 339-344;
> *National Labor Relations Board* v. *Thompson Products*, 97 Fed. (2nd) 13, 15.

The Court applied this standard specifically (R. 1746) in sustaining the Board's findings relating to the petitioners' alleged reasons for laying off six employees whom the complaint charged had been discharged for their labor organization membership and activities contrary to Section 8(3) of the Act. Undoubtedly the same erroneous and inadequate concept of its power and duty to search the record to see whether or not there was *substantial supporting evidence* for the Board's findings, pervaded the Court's action in sustaining other findings of the Board.

Under a more adequate standard of judicial scrutiny (which, we submit, even the Act requires of the Court), these findings of the Board and the order of the Board based thereon should have been, and should now be, set aside for want of any substantial evidence to support them.

Other Circuits have held to the requirement of *substantial* evidence to support the findings of the Board.

> *National Labor Relations Board* v. *Bell Oil & Gas Company*, (C. C. A. 5th); decided July 29, 1938; L. R. R. August 8, 1938, pages 24, 26;
> *Peninsular & Occidental Steamship Company* v. *National Labor Relations Board* (C. C. A. 5th); decided July 29, 1938; L. R. R. August 8, 1938, page 28;

National Labor Relations Board v. *A. S. Abell Company* (C. C. A. 4th); 97 Fed. (2nd) 958;
Standard Lime & Stone Company v. *National Labor Relations Board*, 97 Fed. (2nd) 531, 536 (C. C. A. 4th);
National Labor Relations Board v. *Sands Manufacturing Company*, 96 Fed. (2nd) 721, 726 (C. C. A. 6th);
Appalachian Electric Power Company v. *National Labor Relations Board*, 93 Fed. (2nd) 985, 989 (C. C. A. 4th).

Subsequent to its decision in the instant case, the Circuit Court of Appeals for the Second Circuit has apparently adopted the requirement of *substantial* evidence, which it refused or failed to apply here.

Ballston-Stillwater Knitting Company, Inc. v. *National Labor Relations Board* (C. C. A. 2nd); decided August 1, 1938; L. R. R. August 15, 1938, page 23.

In the *Ballston* case, the Circuit Court of Appeals for the Second Circuit, by applying the judicial yardstick of search for *substantial* evidence, set aside findings by the Board.

ARGUMENT

POINT I

The Board has not shown that its assumption of jurisdiction over the petitioners as to the matters here complained of is essential or appropriate or that such jurisdiction has been or could be conferred upon the Board under existing constitutional provisions and concepts

We are in accord with the Court below that "None of the Labor Board cases decided by the Supreme Court has presented a situation like that at bar" (R. 1742) and that "these cases [lately decided under the Act] are not decisive of the case at bar" (R. 1742). Decisions such as that in the *Jones & Laughlin* case seem to us to be distinguishable and inapplicable, both on the facts and the underlying principles; and, with all deference, we shall hope to show the lack of basis for the view of the Court below that "the principles they have announced point to the conclusion we have reached" (R. 1743).

Indeed, we are clear that to uphold the jurisdiction asserted here by the Board would not only disregard the plain admonitions of the *Jones & Laughlin* decision but also would require substantial modification of the ruling of this Court, under the commerce clause, in *Florida* v. *United States*, 282 U. S. 194, 211, 212, and of other recent decisions hereinafter discussed.

Underlying basis of our argument

It may be helpful if we first state our concept of the problem implicit in this jurisdictional issue. We recognize that nothing in the text of the Constitution or in the decided cases confers this jurisdiction explicitly or with-

holds it beyond peradventure. We find ready no "mathematical or rigid formulas" by which it may or should be resolved. We are aware, however, that, under the Act, "the subject of Federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States", and that what is interstate commerce (or what is intra-state commerce) should be approached as "a practical conception" with a view to effectuating practicably the purposes of public control within the frame-work of our Federal form of government.

We further appreciate that whether or not Federal control over activities long regarded as local has now become "essential or appropriate", involves considerations "of degree", as we understand that term, and that the determination of what are "direct" and "indirect" "effects upon interstate commerce" within what may be accepted tests of Federal authority under the commerce clause, should not be made in an "intellectual vacuum" and in disregard of the structure and scope of present-day enterprise nor, on the other hand, in disregard or frustration of the protective regulatory measures taken by the States as well as by the Congress. And by a traditional use of the expressions "direct" and "indirect interference" with commerce, it has at times, at least, seemed that "we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

We do not challenge that the question whether or not particular activities do affect interstate commerce in such a close and intimate fashion as to give rise to a need and basis for Federal control, and so to lie within authority which might be conferred upon the Board, has been left, by the statute as interpreted by the decisions thus far, to be determined "as individual cases arise". And if, as the late Mr. Justice Cardozo said in the *Carter* case (298 U. S. 238, 328), the power of the Congress under the commerce clause is "as broad as the need that evokes it," surely a Federal board

may not broaden its powers by merely *asserting and assuming*, not establishing, the need.

Upon the record here, we maintain that the Board's assumption of jurisdiction should be held to be unauthorized by the Act and repugnant to the Constitution.

Florida v. *United States*, *supra*.

Distinguishing aspects of this case.

The record in this case fairly shows:

(1) That the petitioners' operations, transactions and relations, over which the Board seeks to establish its authority, are primarily and predominantly related to the local policy and local welfare involved in their service of residential and domestic consumers, and are at all times within the domain of existing, all-inclusive State jurisdiction and regulation, including their labor relations and practices, and are not, by reason of their nature or territorial scope or otherwise, beyond the power of the one State to supervise adequately.

(2) That the petitioners' operations, transactions and labor relations are necessarily and properly considered to be exclusively within the jurisdiction of the State of New York because the directness and imminency of their relation to the health, safety, comfort, convenience and general welfare of the millions of people who reside and do business day-by-day in the City of New York, are such as subordinate entirely any of their aspects which might be separately identified as of National public interest for any useful purpose of Federal regulation.

(3) That in terms of human, social or even economic welfare, *desiderata* concerning the "free flow of commerce" would pale indeed in comparison with the problems of health, sanitation, safety and convenience of its own inhabitants, if the petitioners' services were to be disrupted

and New York City were to be without light and power for its millions of homes, and thousands of office buildings, hospitals, schools, libraries, hotels, restaurants, theatres, shops, its police and fire departments, and the public streets.

(4) That the predominance of local rather than National interest may be further appreciated by considering these petitioners and their operations and services in comparison with those of the local water service of the City of New York, concerning which this Court has very recently pointed out that

> "Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths, could not exist. And this is equivalent, in a very real sense, to saying that the city itself would then disappear. * * * Moreover, the health and comfort of the city's population of 7,000,000 souls, and in some degree their very existence, are dependent upon an adequate supply of pure and wholesome water. * * *"
>
> *Brush* v. *Commissioner*, 300 U. S. 352, 370-371.

The picture is essentially the same with respect to the petitioners' services, except that there should be portrayed also the vital dependency of this very water supply service upon the petitioners' supply of electric power. See, also:

> *Pacific Gas & Electric Co.* v. *Sacramento Municipal Utility District*, 92 Fed. (2nd) 365, 369; certiorari denied 303 U. S. 640.

(5) That just as the State of New York should have the primary, undivided, police power to handle any untoward interruption of the petitioners' services should it ever become a reality, so it should have the primary, undivided power to regulate and supervise all of the petitioners' operations, transactions and relations with a view to preventing any such catastrophe.

(6) That there has been and could be no finding and no showing by the Board in this case that the regulatory measures taken by the State and City of New York in furtherance of the protection of their own residents in the City of New York and Westchester County, are inadequate or suitable, or that they have worked or will work otherwise than to facilitate and protect to the fullest extent possible under any National laws the interests of interstate and foreign commerce.

(7) That by reason of these considerations, the attempted assumption of Federal jurisdiction by the Board, over the operations, transactions and relations of the petitioners which are now subject to adequate State control, including the New York State Labor Relations Act, is not necessary or appropriate and transgresses our constitutional balance of State and Federal powers.

The Board has shown no necessity for its assumption of jurisdiction

What we actually have in this case, and essentially all we have in this case, are a charge, complaint, proceedings, findings, etc., as to matters which involve only intra-state employers and wholly intra-state operations and which can be just as adequately and thoroughly dealt with by the State Board as by the National Board. There is and could be no finding that the action of the State Board would protect and safeguard interstate commerce any less adequately and thoroughly than would that of the National Board.

The National Board has not found any inadequacy of the State's regulation of the petitioners' operations and relations or of matters such as those of which the Board complains. The Board has professed to find that the labor practices alleged in the complaint might cause a strike and that a strike might interfere with interstate commerce *conducted by others than the petitioners*. But for reasons already shown above, even these assumptions by the Board do not make a sufficient showing of *need and justification* for the

extension of Federal authority over matters otherwise within the domain of State authority and so for the displacement of the existing control by the State.

The predominance of local interest and concern

We have emphasized the predominance of the inter-relation of the petitioners' operations, transactions and labor relations and the domestic welfare and local government of the State of New York, over any separate National interest, together with the local regulatory measures already effective as to petitioners' operations and labor relations under the laws of the State of New York, because we believe that *considerations of this predominance and the correlative absence of any necessity for superseding State control with Federal control, constitute a judicial yardstick by which the validity of the jurisdiction sought by the Board should be tested.*

This Court adopted such a rationale in sustaining the State regulatory authority in *Pennsylvania Railroad Company* v. *Knight*, 192 U. S. 21, 26:

> "To hold the even balance between the Nation and the States in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life and business conditions. Into many relations and transactions there enter elements of a National as well as those of a State character, and to determine in a given case which elements dominate, and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing."

It seems to us that the Chief Justice indicated essentially the same test, in sustaining the exercise of Federal power in the *Jones & Laughlin* case, upon the basis of the organization of industries on a National scale which make "their relation to interstate commerce *the dominant factor* in their activities." He said (301 U. S. 1, 41):

> "When industries organize themselves on a National scale, making their relation to interstate com-

> merce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

This Court declared further, in the *Knight* case (page 27):

> "But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction."

The excerpts from these two opinions are pertinent to the record here, because it is barren of any showing of the *necessity or appropriateness* of the Board's proposed exercise of power under the commerce clause. The facts here negative any claim that the petitioners' "relation to interstate commerce" is in any way "the dominant factor in their activities." Of course, the National Board found that if the petitioners' services were effectively interrupted by a strike, there would be some obstruction of the flow of commerce, but that generalization falls far short of a showing that the intervention, jurisdiction and action of the National Board in destruction of State regulation are essential or appropriate; it is far short of satisfying the foregoing ruling that "unless the interstate character is established, locality determines the question of jurisdiction." Anything found by the Board here falls far short of overcoming the presumption that the action of the State of New York, under its State Labor Relations Act, to protect the safety, comfort, health, convenience and general welfare of its people, would not serve at least equally well and altogether adequately any more remote economic welfare and commercial convenience implicit in maintaining a "free flow of commerce".

More important still, the generalized findings here are far short of the mandate of this Court in *Florida* v. *United States*, 282 U. S. 194, 211, 212, that the exercise of Federal power under the commerce clause shall be conditioned upon

> "suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear"

and be supported by adequate evidence and findings of appropriate definiteness.

Significance of the principles of the *Florida* case and related rulings

If such a basis for determining the issue of Federal versus State control over matters claimed by Federal authority to have some National as well as State elements (namely, according to the predominance of the State or Federal interest in the subject matter and with regard for the existence or absence of need for supplanting State and Federal control) were held invalid, and if the rationale and decision of this Court in *Florida* v. *United States, supra*, were held to be inapplicable to this case, we would be at a loss to anticipate or suggest a basis for judicial judgment whereby any State control of any matter otherwise within the domain of State power would survive otherwise than by the possible sufferance of the Congress and the boards created by it. True indeed it is that, "If centripetal forces", to quote Mr. Justice Cardozo in the *Schechter* case (295 U. S. 495, 554), "are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system."

The Board seems disposed to disregard these considerations entirely. In its brief in opposition to certiorari, it took the position:

> "Petitioner repeatedly suggests that it would be more appropriate for their labor relations to be governed by the New York Labor Relations Act. But

> the fact that New York has enacted a statute similar to the Federal law is irrelevant to the question of Federal power. The power of Congress to prevent serious interruptions to interstate commerce must be the same in all the States; whether that power should on occasion yield to State action under similar State legislation is entirely a matter of legislative policy and not of constitutional law." (Brief, page 22)

These avowals seem alien indeed to the principles expressed by this Court in the *Florida* case and the *Knight* case, quoted above, as well as the kindred opinions in *Pennsylvania* v. *Williams, et al.*, 294 U. S. 176; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315. These decisions seem to us to illustrate the limitations which our federal system of government necessarily places upon the exercise of National jurisdiction over matters of domestic concern. Where the local interest in internal affairs and transactions dominates, control over such matters should be assigned to the State rather than the Nation, so as "to hold the even balance between the Nation and the States in the exercise of their respective powers and rights".

> *Pennsylvania Railroad Company* v. *Knight* (at page 26).

Under the principles of the *Florida* case as we read it, there can be no presumption that local activities or anything pertaining thereto so *affect commerce* as to justify the interjection of Federal control. On the contrary, as was there held in accord with the *Knight* case (page 27), "when service is wholly within a State, it is presumably subject to State control."

It cannot be accepted as either essential or appropriate for the Federal Board to take control of local activities in which the inhabitants of the State have a paramount interest, and upon which the State and City governments are directly dependent in exercising many important parts of their police powers, and over which the State has established a complete and adequate system of control "for

accomplishing the same end, through the action of a State officer, in substantially the same manner and without substantially different results from those to be obtained" by the exercise of Federal authority.

Pennsylvania v. *Williams* (at page 182).

The contentions of the Board seem to be in direct conflict with the principles of these cases. And certainly it is not clear how its thesis that "The power of Congress to prevent serious interruptions to interstate commerce *must be the same in all the States*" is any more compelling with respect to the labor relations of an intrastate employer like the petitioners, than it was with respect to the *intra-state* rates of an interstate carrier, as involved in the *Florida* case. There has been and could be no finding or showing that the business of supplying gas, steam and electricity to local consumers in one city and county is of such a character as to require general and Nationally *uniform* regulation.

Missouri v. *Kansas Natural Gas Company*, 265 U. S. 298, 309.

Jurisdiction not conferred because some of the petitioners' customers are engaged in interstate commerce

The Court below thought that this jurisdictional issue should be "approached as a question of fact, namely, what will be the result upon commerce of a labor dispute between the petitioners and their employees" (R. 1741). In view of the stated functional dependence of several railroads locally upon the petitioners' service, it was concluded that "Should such a dispute result in interrupting the petitioners' service, the effects upon commerce would be catastrophic" (R. 1741). The idling of the railroads, stoppage of interstate communication, and the going out of the lights which aid interstate ferries and foreign steamships, if such should be the result of interference with the continuity of the petitioners' service, would constitute "effects we cannot regard as indirect and remote" (R. 1741-1742).

Do *customers'* mechanical connection with, or functional dependence upon, the petitioners' services, determine the issue of Federal versus State control of the *petitioners'* transactions and relations? Are, for example, the local water companies, the rapid transit companies, the bus companies, taxicab companies, suppliers of foodstuffs to dining cars, etc., in and about New York City, also to be brought within exclusive Federal control because railroads or other customers are mechanically connected with, or functionally dependent upon, the services of these local enterprises?

Did all of the local utility companies and other suppliers of the employers in the *Jones & Laughlin*, *Fruehauf*,[1] *Friedman*[2] and *Santa Cruz*[3] cases come under Federal jurisdiction upon the rendering of the decisions in favor of the Board by this Court in those cases?

Functional dependence could not control the constitutional issue

The functional dependence of many if not most of the petitioners' customers upon the continuity of petitioners' operations and service, has been summarized at pages 15 to 18, *ante*. This same functional dependence is equally immediate and real with respect to the services of every operating utility in every single community in the United States which has a utility company. And rare and tiny indeed is the utility company in any community in the United States which supplies no service for postal facilities, nor to any telephone or telegraph company, nor to any broadcasting stations, nor to any newspaper plant, nor to a carrier by air, water or land. Rare and small indeed is that operating utility company in the United States which does not supply customers who, in turn, buy and sell in interstate or foreign commerce.

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[1] 301 U. S. 49.
[2] 301 U. S. 58.
[3] 303 U. S. 453.

The Court below said: "This is not to say that all utilities are within the Act. 'The question is necessarily one of degree.' " (R. 1742).

But if the problem were "approached as a question of fact, namely, what will be the result upon commerce of a labor dispute" between the utility company and its employees if such dispute should result in interrupting the company's service in disregard of the paramount local interests and the adequate State regulation according protection to both interstate and intra-state interests, rare and small indeed would be any utility company anywhere in the United States which would not be brought within the Act.

The remoteness of the relationship relied on by the Board

But even with respect to the petitioners here, we maintain that the Board and Court erred in holding that such a close and substantial relation exists between the petitioners' labor practices and possible obstruction of commerce as constitutionally could justify subjecting the petitioners to Federal control.

The "ifs" in the causal sequence posed by the Board and sustained by the Court are manifest: *If* a labor dispute should arise between the petitioners and their employees, and *if* that dispute *should result in a strike*, and *if* that strike should culminate in a sufficient shut-down of the petitioners' service, commerce conducted *by others* would or might be interrupted.

The Court's construction of the consummation of such a contingency accords no efficacy or credit to the office and functions of the New York State Labor Relations Board, nor to the other public authorities of the State and City of New York who would be immediately and primarily concerned by the incipiency of such a labor dispute. And certainly there is no basis, we submit, for an assumption that the National

Board could be or would be any more effective than the New York State authorities in *absolutely preventing* the catastrophe resulting from the strike as posed by the Court. The Federal Act, like the State Act, refrains from vesting the Board with any prohibitory powers over strikes (the privilege of striking is expressly reserved) and, we repeat, there is no showing that the National Board in the exercise of its jurisdiction over labor practices is more qualified to act against the petitioners than are the New York State Labor Relations Board and other New York public authorities.

But even if the labor practices of the petitioners were in a close and substantial relation to the free flow of commerce, we do not understand that Federal jurisdiction may be extended over matters otherwise within the domain of State power as is attempted here. Even if the relationship between interstate and intra-state rates be considered "direct" (see, for example, the opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 328), it will be remembered that the exercise of Federal authority over intra-state rates was sustained in the *Florida* case *only conditionally and secondarily;* namely, upon "suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear" and be supported by adequate evidence and findings of appropriate definiteness. As we have shown (page 54, *ante*), there is no such evidence and there are no such findings here.

The applicability of the *Florida* decision here

To emphasize further the applicability of the rationale of the ruling of this Court in the *Florida* case, we refer to the following statement by the Chief Justice in the *Jones & Laughlin* case, as to the jurisdiction of the Board under the terms "commerce" and "affecting commerce":

> "The grant of authority to the Board does not purport to extend to the relationship between all indus-

> trial employees and employers. * * * It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." (301 U. S. 1, 31.)

There are no findings, conclusions or evidence in this case that, ***notwithstanding the measures already taken by the State of New York,*** commerce has been, may be, or will be burdened or obstructed by anything which any employees of the petitioners have done or will do. There are no findings, conclusions, or evidence in this case which even profess to establish any justification for the assertion of jurisdiction by the National Board ***in derogation of the measures taken by the State of New York.*** Even more conspicuously than in the *Florida* case, the Board here has failed to find any deficiency in State control prejudicing the "free flow of commerce." The Board here has acted, as it has argued, as if its jurisdiction over the petitioners is absolute or at its unfettered option.

The underlying principle of the *Florida* case was given effect also, as we see it, in

> *Pennsylvania* v. *Williams, et al.*, 294 U. S. 176; and *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315.

By the same token that the Federal Courts and other Federal authorities are required to refrain from taking cognizance of matters of domestic concern and policy when the exercise of such jurisdiction or power is neither appropriate nor essential by reason of the State's adequate processes to accomplish the same ends, thereby honoring the State's vital concern in controlling its own local affairs, so the National Board here should be excluded from jurisdiction over the petitioners, to the end that the State of New York may administer its affairs, free from unnecessary

Federal intervention. Such a ruling by this Court would establish again a

> "proper regard for the rightful independence of the State governments in carrying out their domestic policy".

The jurisdiction not conferred because some of the petitioners' supplies are acquired by others who bring them into the State of New York

The stipulated and agreed facts as to the origins of supplies used by petitioners are at R. 1364-1372. Gas-oil is delivered to only one of the petitioners; delivery is made by the seller, within the City of New York (R. 1368). Delivery of coal to the storage yards and stations, all within the City of New York or in Yonkers, is made by independent enterprisers (R. 1367-1368). No employee of the petitioners is engaged in interstate transportation of any materials (R. 1368). Some of the supplies other than coal and oil originate outside the State (R. 1371).

The petitioners concededly do not own or operate any oil wells, coal mines, factories, or facilities of interstate transportation (R. 1366). Purchases are made only from non-affiliated producers or dealers, and purchases extra-state are shipped only through instrumentalities of transportation which are owned and operated by independent carriers. All purchases are made by individual contracts covering the particular transaction (R. 1366, 1369). The source of supply may change depending upon market conditions, or the needs of particular petitioners (R. 1364, 1369). Requirements of particular petitioners are supplied from storage (R. 1364, 1367); no employee of any petitioner is involved until the supplies have "come to rest" in storage, and only an insignificant number of employees is involved until the supplies are moved into consumption (R. 1367-1368).

The record shows that the petitioners make all of their purchases for their own consumption exclusively. They buy nothing for resale in interstate markets or elsewhere; they sell their by-products entirely within the State of New York and credit the proceeds against their production costs (R. 1372-1373).

The controlling fact here, as in the *Schechter* case, is that although coal, oil and other materials originate outside the State, *the use of such materials is essentially and only local and intra-state;* viz., for the production of gas, electricity and steam for delivery to consumers wholly within the State of New York and *in no instance for National or interstate markets.* The interstate transportation that precedes local manufacture and distribution cannot be isolated to the exclusion of the local use for which the materials are intended. Since this use is local in its immediacy, it counteracts and outweighs the fact that the materials have an interstate origin; otherwise, every intra-state transaction which involved interstate transportation by others would come within Federal control and thereby put an end to our Federal system.

> *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 554.

We submit that there could be no more basis for sustaining the Board's jurisdiction over the petitioners because of their purchases of supplies, than there would be in ruling that a *customer* of a utility company which is engaged in interstate sale of its service is subject to Federal control because he receives the utility service, and uses the service, only locally—for example, to light a hotel or office building. Moreover, this Court has held that even where a utility company buys its supply of gas from interstate distribution (which these petitioners do not do as to gas, electricity, or steam), the State jurisdiction is nevertheless paramount with respect to the operations of the

utility company. In *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, 309, this Court ruled:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

Petitioners are not themselves engaged in "commerce as so defined"

The Board's brief in opposition to the petition for certiorari said that "Especially inaccurate and misleading is the repeated assertion by petitioners that they 'are concededly not engaged in "commerce" as defined in the Act' (Brief, pp. 10, 12)". (Brief, page 21; note 7). The Board charged that such a view is advanced "in complete disregard of the fact that petitioners' purchases and receipts of huge quantities of raw materials are transactions unquestionably in interstate commerce. Cf. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Local 167* v. *United States*, 291 U. S. 293" (Brief, page 21).

The Board's charge should have been directed against the Court below, which observed (R. 1739) that

> "It is not contended that the petitioners are themselves engaged in commerce as so defined [in the Act]".

The Board's thesis strikingly reveals, moreover, the drastic extent to which the Board would extend its authority over intra-state enterprises: e. g., If X buys intra-state consumable supplies which Y moves in interstate commerce, X is thereby engaged in interstate commerce.

To the contrary, we cite the rationale and decisions of this Court in:

Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148;
Missouri v. *Kansas Natural Gas Company*, 265 U. S. 298;
Public Utilities Commission v. *Landon*, 249 U. S. 236;
Schechter Poultry Corporation v. *United States*, 295 U. S. 495.

Recent decisions under the Act not decisive or controlling here

The Court below observed that "None of the Labor Board cases decided by the Supreme Court has presented a situation like that at bar. In three of them the Board's order ran against an employer whose business, though local in respect to manufacturing, was plainly interstate in respect to sales of a very large percentage of its manufactured product. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Labor Board* v. *Fruehauf Co.*, 301 U. S. 49; *Labor Board* v. *Clothing Co.*, 301 U. S. 58. In one case the employer was engaged in a business of interstate communication (*Associated Press* v. *Labor Board*, 301 U. S. 103); in others the business was interstate transportation of passengers. *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142; *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261; *Labor Board* v. *Pacific Greyhound Lines*, 303 U. S. 272" (R. 1742-1743).

In the case of each of these employers, interstate commerce was a "dominant factor in their activities", and there was no aspect of predominantly local activities and importance. To the group of cases referred to by the Court below may now be added that in *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453. There also the employer "was directly and largely engaged in interstate and foreign" sale and shipment of the finished product (page 463), and "there

is a constant stream of loading and shipping of products" (page 461), involving directly the *employer's* shipment of at least 37 per cent of his output in interstate commerce.

In none of these cases was the organization and conduct of the employer's business such as to be completely within the authority and powers of a single State; and in none of these cases was there consideration of the effects of the existence of a State Act and a State Board, organized and adequate to deal with the labor relations of employers which constituted predominantly local concerns.

In the case at bar, there could be no problem of breaking with the one-time traditional distinction between "production" and "commerce" in determining the extent of Federal authority to protect interstate commerce from undue burden or obstruction. The petitioners' production and distribution are wholly within the State of New York; they have no interstate sales. They are independent contractors who sell and supply to their customers such amount of their services as their patrons may demand; they exercise no managerial control over their customers or any of their operations. Their purchases of materials originating outside the State of New York are entirely consumed in the operations of their local business and are never resold. The laws of the State of New York, including the New York State Labor Relations Act, give every assurance that would be available under the National Act that the petitioners' labor practices will never burden or obstruct interstate or foreign commerce.

In none of the cases thus far decided were the employers local operating public utilities supplying local service under plenary regulation by State laws and local franchises. In none of the cases was the employer's business one affected with such a local public interest permitting such regulation.

Above all, the petitioners are distinctively local, intrastate concerns supplying predominantly residential and

domestic patrons under plenary State regulation. The local interests are clearly ascendant and predominant.

Board not sole arbiter of its own jurisdiction

Obviously, the Act does not and could not make the Board's decision upon its own jurisdiction binding and conclusive upon litigants and the Courts. If so construed, the Act would be repugnant to constitutional right.

In some senses it is true that practically everything which takes place in American business, and indeed in American life, has some effects upon commerce between the States and tends or may tend to increase, diminish or affect materially that commerce. If the Board's contention in this cause is to be sustained, the Board at its own uncontrolled option can bring under its own jurisdiction the labor relations and practices of practically every business enterprise, small or large, in the United States, and other Federal agencies can apply the same self-expanding process to confer on themselves authority over practically any other phase of business or of life.

Generalized findings in the terms of the statute cannot remove such matters from plenary judicial review. Boundaries and demarcations between Federal and State authority must still exist and be defined and enforced. They may not be moved or obliterated at will by administrative discretion. Their declaration and enforcement remains a prime task of unfettered judicial statesmanship.

POINT II

The Board denied to petitioners the full and fair hearing and impartial determination which are prerequisites of judicial enforcement of its order

Even if the jurisdiction of the Board were to be sustained in this case, the order of the Board should be vacated because

the petitioners were denied a full and fair hearing and an impartial determination according to due process of law. Our challenge is based upon a combination and concert of significant instances. Each of them should, we believe, be sufficient, although standing alone, to vitiate the decision here under review. *Here they have all taken place in one proceeding.* In the aggregate, they show clearly the absence of impartiality as well as the inadequacy of the hearing, and we think that they call emphatically for refusal of enforcement of the Board's order.

If due process of law means the *substance* of right and fair play, we urge with conviction that *such a combination and concert of instances in a single proceeding* should not be condoned or judicial enforcement accorded an order made by the Board in such a manner. Whether these instances took place by design or through mistake or by after-thought, or as a combination of all three causes, they in any event do not produce a decision entitled to judicial enforcement here.

In the nature of things, the essential unfairness of the conduct of proceedings by such a board is not avowed by its counsel or attested by its decision. The presence or absence of "the rudiments of fair play" have to be determined by examining and weighing a variety and multiplicity of incidents, which may be especially significant and conclusive when taken together.

We have specified these matters and stated the facts as to them, on pages 26 to 35, *ante*. We have summarized our argument as to them on pages 44 to 47, *ante*. We have quoted on pages 26 and 27, *ante*, the characterizations of these matters by the Court below.

1. The Board's *ex parte* directions that the Trial Examiner deny to the petitioners an opportunity to present their case, even to the extent of refusing to hear witnesses present in the hearing-room, was both a denial of due

process of law and a non-compliance with jurisdictional prerequisites under Section 10(b) of the Act.

We have shown in detail (pages 27 to 31, *ante*) just what the Board or some member or subordinate thereof required the Trial Examiner to do, by way of denial of opportunity to the petitioners to present their case. This "remote control" of the hearing officer took place by telephone (R. 1187-1189; 1466, fol. 4396). The Trial Examiner TWICE indicated that he felt the Board had deprived him of any discretion in the matter (R. 1309-1312). Of course, no member of the Board had been present at the hearings, had seen or heard any of the witnesses, or had any first-hand knowledge of the situation before the Trial Examiner. In fact, the correspondence between the petitioners' counsel and the secretary of the Board showed that the Board's *ex parte* directions had been issued under a very substantial misapprehension as to what had taken place before the Trial Examiner (R. 1551-1553), in that the Board thought that *he* had made a fair offer which had not been accepted by petitioners' counsel (R. 1550), whereas the fact was that the offer had been made by petitioners' counsel and the Trial Examiner had not felt at liberty to accept it (R. 1312).

This action of the Board (or of the Trial Examiner under its mandate) was clearly arbitrary in the light of the extended opportunity which the Board allowed its counsel in presenting the Board's case; in the light of the freedom which the Board accorded its counsel in amending the Board's complaint during the proceedings and at their close; and in the light of the three months' delay following the summary closing of the hearings, before the Board took any further action in the proceedings. The Court below characterized the exclusion as "unreasonable and arbitrary" (R. 1747).

We emphasize that it was *the Board* that took the initiative in denying the petitioners a fair, full opportunity to present their case. The Trial Examiner indicated no sym-

pathy or accord with the Board's directions to him; counsel for the Board made no objection to the petitioners' request; he expressed himself upon the point as having "nothing to say" (R. 1190). We further emphasize that no reason has been sponsored by the Board or Trial Examiner in this record why the petitioners should not have been accorded their requested opportunity to present all of their evidence at the adjourned hearing on July 6, 1937, except that the Trial Examiner commented that he considered himself "bound by the decision of the Board" (R. 1312).

We maintain that this action by the Board was a direct violation of the mandate of Section 10 (b) of the Act, which provides that an employer complained of shall have the right to "give testimony at the place and time fixed in the complaint", and was contrary to Section 25 of the Board's own Rules, which provides—

> "Any party to the proceeding shall have the right to appear at such hearing in person, by counsel, or otherwise, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence."

This discriminatory departure from the provisions of Section 10 (b) of the Act and Section 25 of the Board's Rules went to the very jurisdiction of the Board, and should be held to have defeated its power to make an enforceable order against the petitioners.

> *National Labor Relations Board* v. *Hopwood Retinning Co.*, 97 Fed. (2nd) 97, 101; decided July 11, 1938 (C. C. A. 2nd).

Cf. *Interstate Commerce Commission* v. *Northern Pacific Railway Company*, 216 U. S. 538, 544 (and citations of the case by Mr. Justice Brandeis in *St. Louis & O'Fallon Railway Company, et al.* v. *United States*, 279 U. S. 461, 493, and in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 75); *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178.

Exclusion of the testimony jurisdictionally vitiates the findings

The Court below thought the "unreasonable and arbitrary" exclusion of the petitioners' testimony did not affect the Board's finding and order, for the reason that upon the hearing of their petition for review the petitioners might have asked the Circuit Court of Appeals to have directed that the Board hear the excluded testimony and that Court might have done so, in its discretion, under Section 10 (f) of the Act. Because the petitioners did not ask the Court to order the Board to receive and consider the testimony which the Board had already refused to take, the Court did not disturb the findings which had been made on the basis of a record from which the petitioners' testimony had been arbitrarily excluded (R. 1312).

It does not seem to us that the arbitrary action of the Board may be thus disposed of. Fair play and full hearing are an obligation of the Board; findings made without them are *jurisdictionally defective and repugnant to due process of law*. For the Court to require the Board to receive and ostensibly to weigh evidence which the Board had arbitrarily refused to receive and consider, and to re-examine its findings in the light of the excluded testimony, would not remedy the fact that the Board's findings and order had been decided on and made in a manner which contravened the Act, the Board's own Rules, and the requirements of due process of law.

2. In conjunction with the other incidents of the case, a denial of adequate and fair hearing was inherent in the "transfer" of the case away from the Trial Examiner without findings and in the withholding of an opportunity for the petitioners to be heard before the Board which made the findings without hearing the evidence.

The facts as to this matter were stated at pages 31 to 35, *ante*; and our argument as to it was summarized at page 45, *ante*.

Nearly three months after the closing of the hearing and the denial of the petitioners' request that witnesses in their behalf be heard, the Board ordered that the proceedings "be transferred to *and continued before* the Board". The petitioners had no notice of this action, other than that involved in receiving a copy of the order after it had been made (R. 1502-1503). Despite Sections 32 and 34 of the Board's Rules, the Trial Examiner made no tentative findings nor intermediate report (at least neither was ever disclosed to the petitioners). No opportunity for any hearing, or to make any argument, or to file any brief, before the Board, was ever accorded the petitioners. Such was the action of the Board, notwithstanding the petitioners' formal application for such an opportunity to be heard by the Board (R. 19-21, 32, 143) was at all times pending before it.

This refusal or failure to give the petitioners an opportunity to see and be heard as to an intermediate report or proposed findings, or even an opportunity to be heard before the Board at all, becomes here of *major and far-reaching effects*, for the following reasons: If there had been any preparation and submission of an intermediate report or proposed findings, or if the petitioners had been allowed to come before the Board itself and be heard, almost certainly there would have been disclosed to the petitioners any intent or proposal, on the part of the Board, to invalidate the contracts with the Brotherhood.

This case is unlike *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 350, 351, where "the issues and contentions of the parties were clearly defined" and "no other detriment or disadvantage is claimed to have ensued from the Board's procedure". There was no intermediate report or findings by the Trial Examiner in the *Mackay* case, after the "transfer" to the Board in Washington, but an opportunity for hearing and argument before the Board in Washington was granted and the hearing was held (page 340). *Either* the submission of an intermediate report *or* the holding of a hearing be-

fore the Board itself would have met the requirements and apprised the petitioners (and the Brotherhood) that their contracts were under attack.

Whether the Board's purpose to annul these contracts had been intentionally concealed by it throughout the hearings or was executed only as an after-thought, an intermediate report or a hearing before the Board itself would almost certainly have brought any such issue into the open. Considering what the Board actually did here, the petitioners had no inkling of any such issue or purpose until the Board's decision on November 10th. The petitioners had never argued or briefed the question of the validity of the contracts before the Board nor before its Trial Examiner.

Throughout the three months prior to the Board's order taking the case away from the Trial Examiner, the very Rules of the Board were and continued to be unequivocal representations to the petitioners that they would be served with tentative findings and intermediate report of the Examiner and that they would have opportunity to file exceptions thereto (Sections 32, 34), and that in any event would be given a suitable opportunity for oral argument before the Board (Sections 29, 37).

The *misleading* information, in the "transfer order", that the proceeding was to be *"continued before the Board"*, certainly gave no indication (much less any full and fair notice) that the Board had taken over the proceeding for the single purpose of deciding it without giving the requested opportunity to be heard (R. 21). The order directed that the proceeding "be transferred to and *continued before the Board*" (R. 64).

Although the order did not indicate the next step in the proceeding so *continued*, the Rules of the Board induced a reasonable belief by the petitioners that there would be further proceedings before the Board and that the long-delayed hearing by the Board would at last be granted. The

requirements of such Rules, although self-imposed, should be deemed to establish prerequisites with which the Board must comply, in order to make a lawful determination. Cf. *Matter of Prowler* v. *Taylor*, 212 App. Div. 116.

These Rules as they then stood (see the Appendix, *post*), seem to us to provide that the Board may remove a proceeding at any time after a charge is filed, either "for the purpose of taking evidence" or "for any other purpose." When the Board transfers a case "for the purpose of taking evidence," then Section 38 of its Rules applies. In such case, the Board, having heard the testimony itself, may decide the matter forthwith upon the record. But when the hearing is transferred "for any other purpose", we submit that Section 37 should apply. Under that section, the Board would be required to conduct the *subsequent hearings* in accordance with the *"provisions of Sections 3 to 31, inclusive, of this Article."*

Sections 3 to 31 deal with the procedure to be followed by the Trial Examiner and, when applicable, by the Board. Among other applicable provisions is the requirement of Section 29:

> "Any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for *oral argument*, * * *."

This requirement is obligatory upon the Trial Examiner, notwithstanding that he has seen and heard the witnesses and followed the evidence as it was presented. This right to be heard becomes all the more vital when the case is taken away from the Trial Examiner and taken over by the Board and its members, who have seen and heard none of the witnesses and do not have the aid and guidance of findings and recommendations by the Trial Examiner under Section 32 of the Board's Rules.

It may be contended that Sections 37 and 38 of the Board's Rules give the Board an unfettered discretion, either to grant to a party to a proceeding the benefit of the Trial Examiner's findings and an opportunity to appear and be heard before the Board, or to suppress, if it sees fit, the proposed report of the Trial Examiner who heard the witnesses, and to deny the party aggrieved an opportunity to present exceptions and appear before it. If such construction is urged by the Board and is upheld, we think that this Court should outlaw any combination of rules of procedure such as Sections 37 and 38 of the Board's Rules here, in so far as they vest discretion in the Board (1) to *initiate* proceedings against a respondent upon the basis and expectation that there shall be findings and a report of the Trial Examiner to which exceptions may be filed by the respondent (Section 32), *but* (2) leave the Board free at any time, even after the close of hearings, to "transfer" the proceeding at its pleasure and *ex parte*, and thereby obviate any such findings, report and opportunity to take exceptions, including any opportunity to appear and be heard orally before the Board.

The Court below said, with obvious moderation and restraint, that the Board's procedure was "not one likely to inspire confidence in the impartiality of the proceedings" (R. 1743). To the petitioners it seems to have been used as a device to cut short their right to be heard fully.

3. The Board's course of action in repeatedly amending its complaint in substantial respects, down to the last day of the hearings, and in failing to give notice or information of such amendments to the Brotherhood, and in refusing to give to the petitioners an adequate opportunity to meet and deal with the changed situations produced by such unexpected amendments, should be taken into account, in conjunction with the other facts as to the manner of hearing and determining this case.

The facts and circumstances as to these amendments were stated at pages 6 and 7, *ante*. Without further argument here, we submit their occurrence as a part of the pic-

ture, to be taken into account with the other circumstances as to what the Board did as to its own case.

4. Without notice to the petitioners or the Brotherhood and without ever stating an issue as to such contracts, either in the complaint as first served or as from time to time amended or on the hearings, the Board invalidated the petitioners' collective bargaining contracts with the Brotherhood and the 30,000 employees who were members of the Brotherhood.

We have stated the facts as to these matters at pages 33 to 38, *ante*, and have summarized our argument concerning them at pages 45 and 46, *ante*.

Argument would seem hardly to be required, to establish that the Board may not invalidate and "dis-establish" the existing contracts without ever stating an issue as to the validity of the contracts, without ever giving to anyone notice or information of such a challenge and issue, and without giving to anyone an opportunity to be heard by the Board as to the validity of the contracts.

Yet that is what the Board has here undertaken to do, by Section 1(f) of its order, which directs the petitioners to "cease and desist" from "Giving effect to their contracts with the International Brotherhood of Electrical Workers" (R. 128). The Court below found that, in view of other provisions of the Board's order, the nullification of these contracts was inappropriate and that petitioners' employees would have "complete freedom to join United in preference to the Brotherhood, or to join neither" (R. 1745-1746).

The petitioners maintain that the record of the course of action of the Board with respect to these contracts discloses either (1) a purpose of the Board not to reveal its claims with respect to them or let the petitioners and the Brotherhood be heard as to them; or that (2) their invalidation was an after-thought, not in mind during the hearings, never disclosed, even belatedly, because the petitioners were

never given a hearing before the Board. In either event, the petitioners were kept in the dark upon this matter from beginning to end—there was no notice of any claim against them and, of course, no opportunity to be heard, to submit any argument or to submit any brief as to their validity.

It seems obvious that the petitioners had a right to be apprised of this issue and be heard as to it. Our challenge is based directly upon what this Court said in *Morgan, et al. v. United States*, 304 U. S. 1:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

Efforts of the Board to justify its course of action

In its brief in opposition to certiorari, the Board said that "The complaint specifically charged the petitioners with having violated Section 8 (1) of the Act by coercing their employees to join the Brotherhood (R. 15). Petitioners were thus unmistakably informed that *their relationship with the Brotherhood was claimed to have been tainted by* violation of the Act, and was to be the subject of investigation at the hearings" (Brief, page 26).

This is not inconsiderably vague—*what* "relationship"? Again there is no mention of *subsisting contracts*. We urge, moreover, that specific matters charged in the complaint involving Section 8 of the Act (being paragraph 22 charging unfair labor practices under subdivisions (1) and (2), of Section 8) (R. 15) constituted no basis for the petitioners being "unmistakably informed", or even suspecting, that collective bargaining *contracts* with the Brotherhood were to be any part of "the subject of investigation at the hearings". If the Board had desired any such unmistaken information, *why was the complaint never amended to include them?*

Furthermore, as we have said before, the validity of the contracts was never made the subject of any attack or investigation at the hearings.

The Board also said that "At the hearings it was brought out that the contracts were made for the purpose of throttling free self-organization and were one of the means of coercion utilized by petitioners in violation of this Section [Secton 8]—indeed, that they were the culmination and the fruit of the coercion" (Brief, page 2[illegible]. Such a statement was not supported by the record, and there could be no citation to the record to support it. The Board dismissed so much of the complaint as charged (Par. 22) the petitioners with "contributing financial or other support to the International Brotherhood of Electrical Workers"; and the Court below found that the invalidation of these contracts was inappropriate, in view of other provisions in the Board's order, to give the petitioners' employees "*complete freedom to join United in preference to the Brotherhood, or to join neither.*"

In its brief in opposition to certiorari (page 29), the Board, in effect, took the position that in the absence of an application by the petitioners *to the Court* for permission to adduce additional evidence under Section 10 (e) of the Act, *the Courts* should approve of a procedure under which the Board may freely annul the contracts of parties without stating any issue as to them and may not only disregard the requirements of its own Rules [Sections 4 (c) and 5] which require that the charge to be answered contain "a clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence" but it may also deem itself independent of Section 10 (b) which enables the Board to act *only* upon a "complaint stating the charges".

To say the very least, these contentions deny that the very statute creating the Board and its jurisdiction is of

controlling consequence with respect to its procedure. There can be no support for such contentions. "The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing."

National Labor Relations Board v. *Jones & Laughlin Steel Corporation*, at page 47.

In effect, the Board contends that notwithstanding the express provisions of Section 10 (b) of the Act and Sections 4 (c) and 5 of its own Rules, it should be allowed in effect to first condemn and then hear, and so be given power "possessed by no other officer, administrative body or tribunal under our Government."

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 91;
Morgan v. *United States*, 298 U. S. 468; 304 U. S. 1;
United States v. *Seminole Nation*, 299 U. S. 417, 421-422;
Federal Trade Commission v. *Gratz*, 253 U. S. 421, 427.

In the last cited case, this Court ruled that the Commission acting under Section 5 of the Federal Trade Commission Act is jurisdictionally dependent upon the complaint, and that if it acts otherwise its order is improvident "and, when challenged, will be annulled by the Court." The same rule should apply to the proceedings and order under the Act. Such is the plain intention of Section 10 (b) of the Act as well as of Sections 4 (c) and 5 of the Board's Rules and Regulations and the due process requirements of a fair hearing. See, also:

National Labor Relations Board v. *Hopwood Retinning Co.*, 97 Fed. (2nd) 97, 101 (C. C. A. 2nd); decided July 11, 1938.

We maintain further that the provision of Section 10 (e) of the Act, to which the Court below referred in sustaining the Board's exclusion of petitioners' evidence, was never intended to apply to a situation like that now under con-

sideration. Such a ruling by the Court below would permit unrestrained action by the Board in excluding testimony and evidence for no reason whatsoever, thereby forcing the victim to pursue the Board in Court for an order requiring the Board to receive the evidence. The opportunity for full and impartial hearing should not be conditioned upon the necessity of such interlocutory resort to the Court from time to time for compulsory orders against the Board to require it to give such a hearing.

The discriminatory departure from the Act and Rules nullified any jurisdiction of the Board to make this order or any part thereof.

Interstate Commerce Commission v. *Northern Pacific Railway Company*, 216 U. S. 538;
Kansas City Southern Ry. Co. v. *Interstate Commerce Commission*, 252 U. S. 178.

We contend that when the Board "unreasonably and arbitrarily" disobeyed the requirements of the Act and its own Rules, its action was *ultra vires* the statute.

5. Remote hearsay and mere rumor were permitted to dominate the testimony, to an extent repugnant to due process of law.

This aspect of the record should be appraised and given effect, from examination of it, in conjunction with the other matters already stated as to the manner of trial and determination. We shall discuss this aspect under Point III of this brief, in relation to the question whether *substantial evidence* supports the Board's findings.

Cumulative effects of the matters complained of

Under the various headings above, we have brought together the details of the course of action which the Board followed as to these petitioners. The non-judicial, sum-

mary, *ex parte* action of the Board in directing the Trial Examiner to restrict and exclude the petitioners' witnesses and evidence; the arbitrary exclusion of such testimony; the acceptance and use of remote hearsay testimony beyond the reach of cross-examination and transcending the traditions of an impartial, judicial or quasi-judicial tribunal; the *ex parte* transfer of the proceedings to the Board without notice (other than a copy of the order, which was positively misleading) and with no opportunity for the petitioners to show before the Board even that they may have been prejudiced by the cutting off of all opportunity to except to the Trial Examiner's findings and report; and the action of the Board in not revealing its claim against the petitioners' collective bargaining contracts with the International Brotherhood of Electrical Workers, did in the aggregate deny in substance and not merely in form, petitioners' rights to a full and impartial hearing and fair adjudication.

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38;
Morgan v. *United States,* 298 U. S. 468, 480;
Morgan v. *United States,* 304 U. S. 1.

In *St. Joseph Stock Yards Co.* v. *United States, supra,* Mr. Justice Brandeis observed (page 73):

> "The inexorable safeguard which the due process clause assures is * * * that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

If, as the Court below found, the Board's refusal to hear petitioners' witnesses was "unreasonable and arbitrary", and if the Board's *ex parte* "transfer" and decision of the case without findings or intermediate report by the Trial

Examiner were a procedure not "likely to inspire confidence in the impartiality of the proceedings", and if the contracts with the Brotherhood were nullified unnecessarily without notice of any claim against them and with no opportunity to the petitioners or the Brotherhood to be heard even by argument or brief in support of them, then we submit that the "applicable rules of law and procedure" essential to due process were *not* observed by the Board.

POINT III

The Board's findings disregarded the substantial evidence, and the Court below adopted an inadequate standard of review of the Board's findings, thereby sustaining findings not supported by substantial evidence

The petitioners are confident that the outcome of this case should and will be determined by the considerations which have been urged under the preceding points of this brief. There is, however, a third aspect of the case which has no inconsiderable importance, as to the law and the facts; and the petitioners are unwilling to leave with the Court any impression that they acquiesce in the findings, the atmosphere, and the imputations, with which the Board has surrounded, and tried to fortify, practically the whole of its decision and order.

Any extensive reading of the testimony of the Board's witnesses will, we believe, show the flimsy and biased character of the "evidence" which the Board preferred to accept as basis for findings. Even the testimony of the Board's own witnesses was sufficient to cast doubt upon the verity of its findings. Reading of the testimony of Mr. Floyd L. Carlisle and Mr. Harold Dean, the only two witnesses whom the Board permitted the petitioners to place on the stand, would leave an indelible impression that the realities of the situation were not as the Board's findings stated them to be.

The Board's disregard of the substantial evidence upon the major issues would have been demonstrated and corrected, we think, if the reviewing Court had not substantially misconceived the scope of its powers and duty to scrutinize and review important findings of fact by the Board. It declined to search the record to see if the findings were supported by *substantial* evidence. Thereby the Court below seems to have *abdicated* or unduly limited its judicial functions in this field, to the extreme of sustaining the Board's findings unless, as it said (R. 1746), the record "*is wholly barren of evidence*" to support them. Such a test does not afford a judicial review of a substantial quality and efficacy.

> *Washington Coach Company* v. *National Labor Relations Board*, 301 U. S. 142, 143;
> *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 339-343;
> *National Labor Relations Board* v. *Thompson Products*, 97 Fed. (2nd) 13, 15.
>
> See, also, the numerous cases cited on pages 48 and 49, *ante*, as to the rulings of the various Circuits that the findings of the Board are to be sustained only if supported by *substantial* evidence.

To illustrate: The opinion of the Court below as to the findings of fact concerning the discharge of five employees, said (R. 1746):

> "The petitioners presented testimony that these men were discharged because it was necessary to reduce the size of two departments in which they worked; that in making such reductions preference was given to married employees; and that these men were single and were treated no differently than others, both union and non-union, who were laid off about at the same time. The Board rejected this explanation chiefly, it would seem, because other single men with less seniority of service were retained. The question is not whether this court would have reached the same conclusion as the Board, but whether there

> is evidence, to support the Board's findings. Section 10(d). *We cannot say that the record is wholly barren of evidence to support the charge that they were discriminated against on account of union activities. Hence the order requiring that they be reinstated and made whole for losses sustained by reason of their discharges must stand.*" (Italics ours.)

Even the Act, we submit, contemplates a more substantial judicial scrutiny of the evidence supporting the Board's findings of fact. Under the Act an order of the Board is made enforceable by the Court upon "a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board" (Section 10[e]). The Court is empowered to enter its decree "*enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part* the order of the Board." "The order of the Board is subject to review by the designated Court, *and only when sustained by the Court* may the order be enforced." *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra* (page 47).

Review should see if substantial evidence supports the findings

We urge with confidence that these functions cannot be said to have been exercised in a *substantial* manner if the Court scrutinizes the evidence supporting contested findings of the Board only to the extent of determining that "We cannot say that the record is *wholly barren of evidence* to support the charge * * *".

In the *Jones & Laughlin* case (page 47), this Court declared that "the findings as to the facts are to be conclusive, but only if supported by evidence."

In *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142, 147, the matter was amplified as follows:

> "In the case of statutory provisions like §10(e), applicable to other administrative tribunals, we have

refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by substantial evidence."

This requirement of "substantial evidence" has been elaborated upon in subsequent judicial decisions. In *National Labor Relations Board* v. *Thompson Products*, 97 Fed. (2nd) 13, 15 (C. C. A. 6th), the matter was stated as follows:

> "Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A. 160(e), provides that the finding of the Board as to the facts, if supported by evidence, shall be conclusive.
>
> "In applying such statutory provisions, the court will not review the evidence or weigh the testimony and will approve the order of the Board unless clearly improper or unsupported by substantial evidence. Washington, Virginia & Maryland Coach Company *v.* Labor Board, 301 U. S. 142, 147, 57 S. Ct. 648, 650, 81 L. Ed. 965.
>
> " 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their eitirety and relation to each other, arrives at a fixed conviction.
>
> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought."

In *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 Fed. (2nd) 985, 989 (C. C. A. 4th), it was said:

"The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819."

Of course, it is necessarily recognized that these definitions of the requirements of "substantial evidence" provide no mechanical assurance of a proper determination in a particular case. We quote them, however, as a basis for urging upon this Court a conviction that: (1) The Board disregarded the realities and the substantial evidence, in making the findings on which it based most of its recriminations and its mandates; (2) The Court below scrutinized the evidence in support of the findings of the Board according to a standard too lenient—by a standard which provides no "dividing line between law and arbitrary power"; and (3) Under a more substantial standard conforming to the substance of right, the findings of the Board respecting the petitioners' reasons for discharging the six employees named in the amended complaint and the order based thereon, and the findings of the Board upon other controverted matters, should and would have been set aside by the Court below.

Remote hearsay and rumor dominating the testimony

First we ask the Court to note, from the record, that the quality of the testimony which the Board's counsel was allowed to introduce, over petitioners' objections, and upon which the Board rested its findings, fell below the requirements of an impartial tribunal. Rules of evidence were disregarded, not at all to facilitate the exposition of expert

opinion or to aid the establishment of technical evidentiary data or abstruse conclusions of fact or law. We urge with strong conviction that any extended examination of the record of the testimony of the Board's witnesses (excepting, of course, the stipulated and agreed facts on jurisdiction) will disclose that prejudicial hearsay three or more degrees removed and mere rumor were freely received. To illustrate: A member and paid organizer of the United (Mr. Kennedy) would testify that another member and organizer of United (Mr. Young) told him on the telephone ("either in the latter part of 1934 or the first part of 1935") something which some other person told Young that such other person thought (R. 617, 618, 619).

Instances of this character abound throughout the transcript; they are the rule rather than the exception; and the petitioners' objections to the character of such evidence were almost always overruled. See, also, the repeated instances where petitioners' objections to evidence as to matters transpiring not merely before the complaint, but even before the effective date of the Act, were likewise overruled (R. 179, 193, 194, 199, 354, 357, 358, 427, 430, 431, 436, 1107, 1198).

To illustrate further: In a back-handed way, Paragraph 17 of the complaint supported its charge (that of "interference" with the right of employees to form, join or assist labor organizations), by alleging that the petitioners "employ and have employed industrial spies or undercover operatives for the purpose of disclosing to the respondents the activities of their employees in and on behalf of labor organizations."

The undisputed testimony was and is that the petitioners' employment of outside investigating agencies of any kind and for any purpose was voluntarily discontinued by the petitioners in the Summer and Fall of 1936, and in no instance continued after November of that year (R. 336). The only specific instance adduced as to any matter within the scope of the Board's case was in April of 1935 (R. 300),

before the taking effect of the Act. There was specific and extended evidence that the work of such outside agencies as were formerly employed by the petitioners, was directed to matters within the province of management and other than employee activities in labor organizations (see R. 324-325, 333-336, 1273).

In any event, the petitioners' voluntary and complete discontinuance of the employment of outside operatives, more than six months before the complaint was served, made the allegation of Paragraph 17 moot and academic; and the matter did not figure in the case, after the fact of discontinuance in 1936 was established.

Again, a reading of the testimony of Mr. Carlisle (R. 1202-1354) and Mr. Dean (R. 1254-1308) will, we think, negative the impression that actual *coercion* of employees by the management took place, through discharge of employees or otherwise. Some employees joined and are members of the Independent Union, some joined and are members of the CIO affiliate (now known as the United), some joined no labor organization, and more than 80 per cent of the employees joined the Brotherhood. *Thirty thousand* employees of such an industry were not *coerced*.

The basic point of view of the management was that which, according to the testimony of one of the Board's principal witnesses (R. 892), Mr. Carlisle expressed on April 22nd to a large meeting of the employees and their representatives (R. 1209 *et seq.*):

> "Let me say it very plainly, no member working for this company has got to do anything except what they want to do individually, on their own. I will be very clear about that. It is your selection. *You are to do as you please.* We are not taking the position that you must do this or you cannot do this. *You have to make the choice.* * * * You go out and do what you want."

Illustration of the results of the standard applied by the Court below

We have noted that the Court applied its standard specifically (R. 1746) in sustaining the Board's findings relating to the petitioners' alleged reasons for laying off five of the six employees whom the complaint charged had been discharged for their union activities. Here at least were instances where the men discharged were called as witnesses, and they *testified* that they were discharged because they belonged to a union. *The question which required the judgment of the Court below was whether the substantial evidence supported their highly interested avowals.* Therefore, without in any way accepting or acquiescing in the findings of the Board or the Court below upon other controverted matters, we shall demonstrate our point by dealing specifically with the very findings as to these men. We do so with conviction that the same erroneous and inadequate concept of its power and duty to search the record to see whether or not there was *substantial supporting evidence* for the Board's findings, undoubtedly pervaded the action of the Court below in sustaining other findings of the Board.

The findings and the evidence as to the discharge of six men

Five of these six men were employees of one of the petitioners, New York and Queens Electric Light and Power Company. Three of these five employees, Messrs. Wersing, Greulich and Wagner, were laid off on November 29, 1935. Two of them, Messrs. Kennedy and Emler, were laid off on June 19, 1936. The sixth man, Mr. Solosy, was an employee in the chemical department of the gas business of the petitioner, Consolidated Edison Company of New York, Inc. He was laid off on January 17, 1936.

We review the evidence upon which the Board's findings are supposed to rest:

1. As to Messrs. Wersing, Greulich and Wagner

At the time of their discharge (November 29, 1935), these men were employed as clerks in the work order bureau

of the auditor's department (R. 1255) which has to do with the allocation of charges to work orders, the keeping of the stores inventory, and the pricing and posting of costs of materials, etc. (R. 1255). They were so employed by the petitioner, New York and Queens Company.

Mr. Wersing was a clerk in the pricing and posting section of the bureau—one of twelve clerks. Mr. Greulich was a clerk in the same section. Mr. Wagner was an accounting assistant in what is known as the other order division of the work order bureau (R. 1256).

Mr. Wersing and Mr. Greulich reported to a clerk in charge, who, in turn, reported to a Mr. Locke, chief of the division, and he, in turn, reported to a Mr. Mehrtens, supervisor of the work order bureau, and the latter reported to Mr. Hausenbauer, who was the auditor and in charge of the auditor's department (R. 1256).

Mr. Wagner reported to a clerk in charge who, in turn, reported to a Mr. Eller, chief of the other order division, and Mr. Eller reported to Mr. Mehrtens mentioned above (R. 1256).

What were the circumstances inducing their discharge?

They were laid off to provide for the transfer of surplus employees in the inventory department. The inventory department had been made necessary by the requirements of an order of the Public Service Commission (R. 1257-1258). A force of some 222 men was assembled for this work between September, 1934, and June, 1935 (R. 1257, 1258). All but three members of this force had been transferred from other departments, where there was already a surplus of employees (R. 1259-1260). Thirty-two came from the auditor's department (R. 1260).

The order of the Commission as to the continuing property records was contested in the Courts and was annulled

in part (R. 1258). As a consequence, the inventory department was over-manned and it was finally reduced from 222 to 45 (R. 1260, 1279). Forty-two employees of this department were laid off directly and 135 were transferred to other departments (R. 1260). These transfers were the occasion in almost every instance for the discharge of a like number of employees in the departments to which these transfers were made (R. 1260, 1306-1307).

The determination of what employees should be laid off to make way for those transferred was not a one-man job. It was decided by Mr. Dean, the Vice-President of the Company, upon the recommendation and reports of the personnel director who had charge over all departments, in conjunction with the heads of the sections, divisions and bureaus which might be affected by the transfers (R. 1261, 1282-1283, 1285).

Mr. Dean testified that he was aware of the union activities of these men (R. 1266, 1272); and it is shown that in February or March, 1935, Mr. Wagner formally notified Mr. Hausenbauer (auditor, and in charge of the auditor's department as set forth above), by letter of his affiliation with the Independent Brotherhood of Utility Employees (R. 717). From Mr. Wagner's own testimony, none of his supervisors is shown to have considered this membership of any moment affecting his employment (R. 718). Mr. Greulich, likewise (R. 552-553).

Studies of personnel in preparation for the reduction of the inventory department began in July, 1935 (R. 1284), and there was a gradual reduction from about that time (R. 1285).

Other employees had been laid off before the men in question; men were laid off on the same day; men have been laid off since. The Board may be technically correct in stating (R. 112) that:

"On November 29, 1935, the three employees were the only employees laid off in their respective *divisions.*"

In all fairness, however: (1) Two other employees, who were members of the so-called "company union", were also laid off at the same time, *as the Board's own witness testified* (R. 482, 564); (2) Mr. Dean further testified on cross-examination by the Board as follows: "Q. Did you consider them for employment elsewhere? A. No, for the reason that *I knew I had a couple of hundred other men to let go*" (R. 1283).

In summarizing the interviews of the three men in question with Mr. Payne of the personnel department (he was not the director of the department, R. 1285), who notified them of their discharge, the Board says: "Each of the three men pointed out that other single men and girls with less seniority were retained, and requested an explanation. *Payne was unable to explain this fact*" (R. 112).

Mr. Wagner testified that Mr. Payne responded that "he is not making the decision" (R. 719). Mr. Wersing testified that Mr. Payne said "that it was not his choice and he did not know how it had come about" (R. 478). Mr. Greulich testified that Mr. Payne said: "Well, I don't know anything about that. I am merely carrying out orders" (R. 566).

We have set forth above the manner in which was determined by recommendation and report of department heads in conjunction with the personnel director (R. 1283-1285), as to who should be laid off and who retained. Mr. Payne was "carrying out orders" from his superiors, which fully explains why *Mr. Payne* could not "explain".

The combined test of family responsibility, efficiency and seniority

The Board further says: "Dean, in his testimony, did not explain why certain single employees with less seniority

were retained, except for the general statement that the department heads in the exercise of their judgment, determined that a number of single employees with less seniority than these three men were more deserving of retention in their jobs because of special qualifications" (R. 112-113). This, the Court below found, was the principal basis for rejecting the Companies' explanation of the lay-offs (R. 1746). *But there was no requirement of law or public policy that* SENIORITY ALONE should have controlled the selection for lay-offs.

When any substantial regard is accorded the uncontroverted testimony, it seems impossible to appreciate how the alleged failure to explain "why certain single employees with less seniority" were retained, was entitled to such weight and compelling force in the Board's findings that the three men "were in fact discharged because of their activities in the Independent Brotherhood" (R. 112-114).

Mr. Dean's testimony stands uncontroverted that seniority was not the sole standard of selecting those to be transferred or laid off but that determinations were made in the light of interrelated factors of family responsibility, efficiency and seniority (R. 1261-1262). There is no finding or showing that these three men were superior to those who remained on the basis of the three factors considered in the combined test. The record shows that—

1. All three of the men in question were young men and none of them was married (R. 1268).

2. Concerning their efficiency as compared with those transferred from the inventory department and displacing them, Mr. Dean testified that "in all cases the men who were transferred from the inventory department were better as employees, or at least as good, and in addition they were all married men" (R. 1268). Their seniority also, he testified, was "at least as long as that of Messrs. Wersing, Greulich and Wagner" (R. 1268).

3. Mr. Dean's further testimony stands uncontradicted that these three men were originally employed in 1929; that, of the forty-two men who were laid off directly from the inventory department, thirteen had been employed in 1929 and eleven subsequent to 1929; eighteen had been employed prior to 1929. Of those transferred back to other departments, thirty-one had been employed during 1929 and forty-five subsequent thereto; fifty-nine had been employed prior to 1929 (R. 1267).

4. With respect to testimony of Mr. Wagner that the three named employees of his bureau (in which there were between seventy and eighty employees) (R. 711-712) were junior to him in length of service, Mr. Dean testified that two of those named were employed in 1929, but at a later month than Mr. Wagner, and the third was employed in January, 1930 (R. 1267-1268, 1282).

5. We also are at a loss to appreciate any validity, or plausibility even, in the argument of the Board (R. 113) that "In the application of the respondents' standard of preference to married men, other things being equal, Wagner would certainly not be the first and only man in his division to be laid off. *Since he was laid off at the same time as Wersing and Greulich, his fellow officers in the Independent Brotherhood, a finding that he was discharged for union activity would be strong evidence that the other two men were discharged for the same reason*".

We know of nothing in the record to support this suggestion that Mr. Wagner was "the first and only man in his division to be laid off". We utterly fail, moreover, to see any validity in the point that if he were laid off for union activity, it would be "strong evidence" that some of his fellow officers in the union also were laid off for the same reason, especially in view of the constant reduction of the Companies' required working forces, both before and after the lay-offs of these few employees (R. 468, 563).

Fair treatment during long period of union activities negatives the Board's inferences

The Board reviews the "union activity" of these three men from about the time they became members of the Independent Brotherhood in February, 1934 (R. 108-110), through November 15, 1935, when they conferred with Mr. Dean, "concerning the discharge of James Mannix, an active member of the Independent Brotherhood. They were satisfied," the Board concludes, "with the reasons given for his discharge and did not press the matter further." The Board then adds: "Dean, however, expressed a strong antipathy to the presumption of the Committee in attempting to interfere with the exercise of his discretion to discharge employees" (R. 111).

Then follows the following combination of argumentative conclusion and remarkable prognostication: "Thus immediately preceding their discharge their union activity had become intensified, while the chief result of their interview on November 15 with Dean * * * *was the likelihood that the memory of a disagreeable episode would linger in Dean's mind*" (R. 111).

Mr. Dean's testimony stands uncontroverted that he did not directly or indirectly cause any of these men to be laid off because of any union activities (R. 1266), and as for the foregoing prognostication of Mr. Dean with lingering, vindictive embitterment over the interview of November 15th, we respectfully request this Court to view Mr. Dean's testimony on cross-examination at R. 1274.

In light of the "union activity" of these men which the Board has found must have been so offensive to the petitioners and that it began *early in the year 1934*, it seems extraordinary beyond belief that, under the Board's theory that they were discharged because of their union activity, they should not have been discharged a long time before November 29, 1935.

In October, 1934, some fifty men were laid off at one time, as one of the Board's witnesses testified (R. 563), but none of these men was included, notwithstanding their union activity at and before that time.

In August, 1935, twenty-five men were discharged from the inventory department, including Mr. Alfred Wrench who was secretary of the union in which these three men were members (R. 468, 563). But none of these men was displaced, notwithstanding their union activity at and before that time. The Board's complaint, moreover, nowhere challenges the discharge of Mr. Wrench, nor is his discharge mentioned in the Board's finding that twenty-five men were laid off in August, 1935 (R. 112).

Notwithstanding Mr. Wersing's extensive "union activity" (R. 431-437) for a long time before, in May, 1935, the Company transferred him from night work to day work at his request (R. 498). "Yes, I would think it was a promotion," he testified (R. 499). Previous requests for transfers also had been granted him during the years 1933 and 1934 (R. 462-466). And, as Mr. Wersing testified, his transfer involved the lay off of the men who had held the job to which he was transferred (R. 518-519)!

Notwithstanding the extensive Union activity of Mr. Greulich from early in the year 1934, the Company allowed him a weekly increase in pay of $2.75 on the basis of a reclassification of his status. This was made after his request in the summer of the year 1935.

In this connection it is also noteworthy that in their *unsuccessful* suit in a State court, based on their discharge, Messrs. Wersing, Greulich and Wagner predicated their cause of action upon an assertion which fully substantiates the testimony of Mr. Dean; namely, that they "were discharged * * * for no other reason than they had to make adjustments in the department looking toward further

economies" (R. 580). Mr. Greulich testified that they took this position "in an effort to get the money" (R. 581). But it seems obvious that if *discrimination* for union activities had been regarded by them at the time as the *motivating cause* of their discharge, they would have asserted it then. Obviously, the present theory was not then in mind; in any event, they will advance any theory "to get the money" (R. 581).

2. As to Messrs. Kennedy and Emler

At the time of their discharge (June 19, 1936), these men were employed in the overhead bureau of the distribution department of the New York and Queens Company (R. 1255). That bureau has to do with the installation and the removal of poles, wires, installation of meters, etc. (R. 1256). Both employees were linemen, first grade (R. 1257).

What were the conditions which brought about their discharge? The overhead bureau had been very active originally when the Borough of Queens was in process of development from a rural area into a borough of the City of New York. There was a great volume of overhead work in the installation of new distribution lines and their extensions (R. 1262). For the past several years, however, this area has been more completely built up; developments have subsided and the overhead work of the Company has constantly declined accordingly (R. 1262).

In addition, municipal authorities have required the Company to change over its distribution system from overhead to underground lines, and this has been going on even during the depression (R. 1263).

The Board concedes that the evidence supports the petitioners' contention that the Company has been in process of reducing the number of its employees in the overhead bureau because of the change of character of the work from overhead to underground (R. 121, 1284).

This process of gradually reducing personnel in this bureau has continued from sometime during the year 1932 (R. 1284). On January 1, 1932, there were 402 employees in the overhead bureau. On December 31, 1936, there were 329. At the time Messrs. Kennedy and Emler were laid off, there were 336 (R. 1263, 1290).

During this period, the Company has attempted in every way possible to provide substitute work to obviate lay-offs, including work on underground lines, work on consumers' premises and even the digging of ditches for conduits into such premises (R. 1257, 1264, 1300-1301, and cf. R. 702).

Attempts also have been made from time to time to enable men to transfer to other Companies within the System Companies where work is available. Indeed a "lead", at least, was given these men, at the time they were discharged, for possible employment with The New York Edison Company (R. 1264, 1265, 1298, 1307, 1308, 659-662).

We note, however, the observations of the Board:

> "It is most significant that the discharges occurred within a week after Kennedy's election as Plan representative for the overhead bureau. He had proved himself a source of trouble to the respondents when he previously held that position, and it was certain that he would now renew his activity within the Plan in opposition to the respondents' domination of the Plan. His election to that position, in spite of his open affiliation with an outside union, is an indication of the influence he wielded among the employees of the overhead bureau. *Discharge would automatically terminate his membership in the Plan, or a transfer to another of the respondents' companies would automatically make him a member of the Plan of such other Company* where he would not retain his position as a bureau representative. *The evidence points to this as the true explanation for the course adopted by the respondents of giving him a choice between discharge* and a transfer to an inferior position in another of the respondents' companies" (R. 120).

This is indeed a remarkable conclusion as to "the true explanation" of the Company's action. We respectfully request this Court to examine the record in this connection at R. 1264, 1265, 1298, 1307, 1308, 659-662, heretofore cited.

Mr. Kennedy's union activity readily dates back into the year 1934 as the Board has found (R. 115-117). He may have considered himself "a source of trouble" to the petitioners for the reasons recited by the Board, but certainly there is no evidence that they took him so (R. 1289, 1296-1297). As in the case of the three men considered above, there was ample time to have discharged Mr. Kennedy long before June 19, 1936, for a great number of men had been let out before that (R. 1263, 1269), including linemen (R. 1284).

Mr. Emler's union activity was comparatively inconspicuous (R. 676-680). It is manifest that he was not regarded by the petitioners as any source of trouble because of his union activity (R. 1289).

Mr. Dean's testimony stands uncontroverted as to how these men were selected to be laid off, namely, by their supervisor and the personnel director in the light of their personnel records and the combined test of family responsibility, efficiency and seniority (R. 1261, 1290, 1269).

The Board states that Dean "did not adequately explain why Kennedy and Emler were laid off, while men with less seniority were retained; nor did he adequately negative Kennedy's statement that after his discharge the men in the overhead bureau were placed on a six day week and that other men were transferred to his department" (R. 119-120).

Mr. Dean did testify, however, how the men were selected to be laid off, as set forth above. And while Mr. Kennedy's record for absences from work is explainable to some extent on account of his illness, the fact still remains that he was

absent from work more than twenty per cent of the time during the twelve months immediately preceding his discharge (R. 1269, 1294). Mr. Dean also testified that Mr. Kennedy's date of last employment was January 18, 1928, and that Mr. Emler entered the Company's employ on July 18, 1927 (R. 1268); that at the time of their discharge there were 54 first grade linemen with terms of service longer than those of the men in question; that twelve had shorter service and that six were in between the two men (R. 1269; cf. R. 689).

Mr. Dean also testified that a short time after the discharge of these men "we had a spurt of work in connection with electric drain installations and we put back people from the Edison Company temporarily that we had previously sent over since then" (R. 1299).

His testimony also stands uncontradicted that the jobs held by Messrs. Kennedy and Emler were left unfilled (R. 1257).

Mr. Kennedy's testimony is also of record that, through the personnel department of the Company, Mr. Kennedy and Mr. Emler were offered an opportunity to get employment in another Company (the New York Dock Company) in the Fall of 1936 (R. 664-665, 694). Mr. Emler took the job and still held it at the time of his testimony (R. 694).

The Board says that "*Payne's* admonition to him [Mr. Emler], in December, 1936, not to resume his 'funny business' at the New York Dock Company clearly indicates how long-lived was the recollection of Emler's union activities in the minds of his supervisors" (R. 121; cf. Mr. Dean's cross-examination, R. 1289).

Apparently this is intended to refer to Mr. Emler's testimony as to what *Mr. Smith* (not Mr. Payne) of the personnel department of the New York and Queens Com-

pany said to Mr. Emler at the time the foregoing job as lineman was procured for Mr. Emler in the Fall of 1936 (R. 694).

We respectfully request the Court to examine Mr. Smith's statement as testified to by Mr. Emler (R. 694). We urge with confidence that the Board would have enjoyed no such free hand in imputing connotations to such variable terms as "funny business" as it here assumes, if the petitioners had been accorded full and fair opportunity to present their case at the hearings.

3. As to Mr. Solosy

Mr. Solosy was employed in the chemical department of the gas business of the Consolidated Edison Company at the time he was laid off on January 17, 1936 (R. 340-348). He was unmarried (R. 383). Several other employees in the same department were laid off at the same time (R. 124, 395-396) because of the closing down of one of the System Companies' gas plants, namely, the "A" plant of The Astoria Light, Heat and Power Company (R. 348). By an offer of sworn testimony of two chemists who were department heads and in the room at the final hearing, the petitioner, Consolidated Edison Company, sought to show that the discharge of Solosy had no relation to his activities or membership in any labor organization (R. 1314); that lately several large gas plants in Manhattan, The Bronx, and Queens, have been shut down and dismantled (R. 1314); that changes and reduction in the labor forces in the chemical department have been continuous and enforced (R. 1315); that such reductions in forces have been made from time to time (R. 1315); that Solosy's work was ordinary (R. 1315). He was laid off under the circumstances stated in the offer of proof (R. 1314-1315) and not at all because of any union activity, but because reduction in forces was necessary and because better trained and more technically educated employees were preferred for retention (R. 1315).

Considerations ignored by the Board

In concluding this review of the evidence relating to the reasons for the discharge of the foregoing men, we should emphasize that the Board's findings and conclusions completely ignore (1) that although several of the Board's witnesses were employees of the petitioners with records for union activity comparable to that of the foregoing men, and might, therefore, have been deemed a "source of trouble" to the petitioners according to the Board's theory, they were still retained in the employ of the petitioners at the time of the hearings (e. g., Mr. Young, employed by the New York and Queens Company, R. 967-990; Mr. McGowan, also employed by the New York and Queens Company, R. 1130; and Mr. Harding, employed by the Consolidated Edison Company, R. 730); and (2) that, although the labor union in behalf of which Messrs. Wersing, Greulich, Wagner, Kennedy, Emler, Solosy and others were active as set forth above, had a membership of petitioners' employees probably as high as twelve hundred in number (R. 390) during more or less of the period of their union activity, the Board appears to have been unable to find that any other members had been discharged for their union activity. And as we have set forth above, the Board nowhere challenged the discharge of Mr. Wrench, secretary of the union, which took place when the twenty-five men were laid off in August, 1935; and the Board reports (R. 111) that when Messrs. Wersing, Greulich and Wagner conferred with Mr. Dean on November 15, 1935 concerning the discharge of James Mannix "an active member of the Independent Brotherhood", "They were satisfied with the reasons given for his discharge * * *";

The petitioners maintain that the questions of jurisdiction and due process of law are decisive of the proceeding here; but we submit that to the extent the substantial evidence in the record is examined, the lack of support for the Board's findings on controverted issues is demonstrated.

POINT IV

The decree of the Circuit Court of Appeals granting enforcement of the order of the Board should be reversed; and the decision, findings, conclusions and order of the Board should be in all respects annulled and set aside

Dated: New York, N. Y., September 17, 1938

Respectfully submitted

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APPENDIX

Applicable Provisions of the Board's Rules and Regulations, Series 1, as amended and effective April 27, 1936 [1 L. R. R. Manual 814].

ARTICLE II

PROCEDURE UNDER SECTION 10 OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

HEARING

Sec. 25. Any party to the proceeding shall have the right to appear at such hearing in person, by counsel, or otherwise, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence.

Sec. 29. Any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the Trial Examiner so directs. The parties shall be entitled to file briefs or written statements only with permission of the Trial Examiner.

INTERMEDIATE REPORT AND TRANSMISSION OF CASE TO THE BOARD

Sec. 32. After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report, which he shall file with the Regional Director issuing the complaint, who will thereafter transmit the original of the Intermediate Report to the Board in Washington, D. C., and cause a copy thereof to be served upon each of the parties to the proceeding. Such report shall contain (*a*) findings of fact, separately stated and numbered and (*b*) recommendations as to what disposition of the case should be made, which may include, if it be found that re-

spondent has engaged in or is engaging in the alleged unfair labor practice, a recommendation as to what affirmative action should be taken by respondent to bring about a condition in harmony with the law.

EXCEPTIONS TO THE RECORD AND INTERMEDIATE REPORT

Sec. 34. If any party desires to take an exception to the Intermediate Report or to any other part of the record (including rulings upon all motions or objections) he shall within ten days from the date of service of the Intermediate Report file with the Board at Washington, D. C., four copies of a statement in writing setting forth such exceptions. Immediately upon the filing of the statement of exceptions the party filing the same shall serve a copy thereof upon each of the other parties to the proceeding. Upon proper cause shown, the Board may extend the period within which to file a statement of exceptions.

PROCEDURE BEFORE THE BOARD

Sec. 36. Where the Trial Examiner has found in his Intermediate Report that the respondent has engaged in or is engaging in unfair labor practices affecting commerce, the Board may, upon the expiration of the period for filing a statement of exceptions, as provided in Section 34 of this Article, decide the matter forthwith upon the record, or after the filing of briefs, or oral argument, or may reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board or other agent or agency, or may make other disposition of the case. The Board shall notify the parties of the time and place for any such submission of briefs, oral argument, or taking of further evidence.

Where the Trial Examiner has found in his Intermediate Report that the respondent has not engaged in and is not engaging in unfair labor practices affecting commerce, and

no exceptions have been filed within the period for filing a statement of exceptions, as provided in Section 34 of this Article, the case shall be considered closed. The Board may, upon motion made within a reasonable period and upon proper cause shown, reopen the record for further proceedings in accordance with this Section.

Sec. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

(*a*) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(*b*) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(*c*) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall

apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

Sec. 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may—

(*a*) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

(*b*) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

(*c*) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

(*d*) make other disposition of the case.

The Board shall notify the parties of the time and place of any such submission of briefs, oral argument, or taking of further evidence.